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Supreme Court, U.S.
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08135 AUG 1 - 2008

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No. _____

IN THE
Supreme Court of the United States

CITY OF POCATELLO,
Petitioner,

v.

STATE OF IDAHO, THE UNITED STATES OF AMERICA, AND THE SHOSHONE-BANNOCK TRIBES,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the water right that Congress granted in 1888 to the City of Pocatello "in common with" the Shoshone-Bannock Tribes, and upon which the City has relied for well over a century, should be set aside on the ground that, although Congress properly manifested its "clear and plain" intent to diminish Treaty rights, Congress lacked the constitutional power to do so in the absence of Tribal consent.

2. Whether the rule of *Caldwell v. United States*, 250 U.S. 14 (1919), which requires that Congress use express words of conveyance to signify the sovereign's intent to convey its own lands to a non-governmental entity, should be extended to diminishment cases, where, as here, an act of Congress clearly manifests the sovereign's intent to diminish and convey tribal rights to water to another party.

3. Whether the Supreme Court of Idaho's construction of the Pocatello Townsite Act, as granting to the City of Pocatello only a federal right of access to reservation lands and a right to seek water rights under state law, rather than the grant of a federal water right, is inconsistent with the Supremacy Clause, which establishes that Indian reservations are to be governed by federal law, not state law, unless Congress has expressly provided to the contrary.

PARTIES TO THE PROCEEDING

The parties to all proceedings below were Petitioner City of Pocatello and Respondents the State of Idaho, the United States of America, and the Shoshone-Bannock Tribes ("Tribes").

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
INTRODUCTION 4
STATEMENT OF THE CASE 9
A. History of the Fort Hall Indian Reservation and the Town of Pocatello. 9
B. History of the Dispute and Proceedings Below. 13
C. Snake River Basin Adjudication Court Proceedings. 14
D. Supreme Court of Idaho Proceeding 16
REASONS FOR GRANTING THE PETITION 17
I. THE SUPREME COURT OF IDAHO'S RELIANCE ON THE ABSENCE OF TRIBAL CONSENT TO SET ASIDE CONGRESS'S "CLEAR AND PLAIN" INTENT TO DIMINISH TREATY RIGHTS IS ERRONEOUS AND PRESENTS AN ISSUE OF FAR-REACHING IMPORTANCE THAT WARRANTS REVIEW BY THIS COURT 20

II. THE SUPREME COURT OF IDAHO'S ERRONEOUS EXTENSION TO DIMINISHMENT CASES OF THE RULE OF *CALDWELL V. UNITED STATES*, WHICH REQUIRES THE USE OF EXPRESS WORDS OF CONVEYANCE TO SIGNIFY THE SOVEREIGN'S INTENT TO CONVEY ITS OWN LANDS, WARRANTS REVIEW BY THIS COURT 26

III. THE GROUNDS RELIED UPON BY THE SUPREME COURT OF IDAHO FOR ITS CONCLUSION THAT CONGRESS INTENDED TO GRANT POCATELLO A RIGHT TO USE WATER ARISING ON THE FORT HALL RESERVATION ONLY PURSUANT TO STATE LAW ARE CONTRARY TO THE SUPREMACY CLAUSE AND WARRANT REVIEW BY THIS COURT ... 31

CONCLUSION 37

TABLE OF APPENDICES

Appendix A — Opinion of the Supreme Court of Idaho, Filed February 19, 2008 ..... 1a-30a

Appendix B — Memorandum Decision and Order on Challenge and Order of the Fifth Judicial District Court of Idaho Disallowing Water Right Based on Federal Law, Filed October 6, 2006 ..... 31a-92a

Appendix C — Recommendation of the SRBA Special Master on the Motion to Alter or Amend, Filed February 8, 2006 ..... 93a-100a

Appendix D — Order of the SRBA Special Master Granting United States', State of Idaho's, and Shoshone-Bannock Tribes' Motions for Summary Judgment, and Order Denying City of Pocatello's Motion for Summary Judgment, Filed July 25, 2005 ..... 101a-135a

Appendix E — Order of the Supreme Court of Idaho Denying the Petition for Rehearing, Filed April 3, 2008 ..... 136a-137a

Appendix F — Remittitur of the Supreme Court of Idaho to the Fifth Judicial District Court of Idaho, Filed April 3, 2008 ..... 138a-139a

Appendix G — Act of Sept. 1, 1888, ch. 936, 25 Stat. 452 ..... 140a-154a

Appendix H — Boundaries of Pocatello and the Fort Hall Indian Reservation From 1888 to Present, and Water Rights Claimed in Sub Case No. 29-11609, Found in Exhibit 24 of Clerk's Certificate of Exhibits of the Record at the Supreme Court of Idaho 155a

TABLE OF AUTHORITIES

CASES

Antoine v. Washington, 420 U.S. 194 (1975) 34

Caldwell v. United States, 250 U.S. 14 (1919) 7, 16, 26, 27

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 32, 36

Cappaert v. United States, 426 U.S 128 (1976) 32

Cherokee Nation v. S. Kan. R.R. Co., 135 U.S. 641 (1890) 22

Chinese Exclusion Case, 130 U.S. 581 (1889) 23

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 27

City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005) 6

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) 32

Confederated Tribes of Colville Indian Reservation v. State of Wash., 591 F.2d 89 (9th Cir. 1979) 19

DeCouteau v. Dist. County Court, 420 U.S. 425 (1975) 19

FPC v. State of Oregon, 349 U.S. 435 (1955) 32, 36

Governor of Kan. v. Kempthorne, 516 F.3d 833 (10th Cir. 2008) 30

Hagen v. Utah, 510 U.S. 399 (1994) ..... passim

In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988) 32, 33

Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004) 22, 24, 29

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 23

Matter of Beneficial Water Use Permits, 923 P.2d 1073 (Mont. 1996) 32

McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164 (1973) 6, 19

Morton v. Mancari, 417 U.S. 535 (1974) 6

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 19

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) ... 22, 24, 28

Potlatch Corp. v. United States, 12 P.3d 1260 (Id. 2000) 5

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... passim

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 19

Shawnee Tribe v. United States, 423 F.3d 1204 (10th Cir. 2005) 22, 28

Solem v. Bartlett, 465 U.S. 463 (1984) 24, 28, 29

South Dakota v. Yankton Sioux, 522 U.S. 329 (1998) 6, 22, 23, 30

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 29

State v. Larose, 673 N.W.2d 157 (Minn. App. 2003) 22, 24

State v. Perank, 858 P.2d 927 (Utah 1992) 29

State v. Romero, 142 P.3d 887 (N.M. 2006) 25

State v. United States, 12 P.3d 1284 (Id. 2000) 5

State v. Wabashaw, 740 N.W.2d 583 (Neb. 2007) 24

United States v. City of Challis, 988 P.2d 1199 (Id. 1999) 5

United States v. Dion, 476 U.S. 734 (1986) ... 6, 23, 24

United States v. Dist. Court for Eagle County, 401 U.S. 520 (1971) 30

United States v. Imperial Irrigati : Dist., 799 F. Supp. 1052 (S.D. Cal. 1992) 29

United States v. McIntire, 101 F.2d 650 (9th Cir. 1934) 33

United States v. New Mexico, 438 U.S. 696 (1978) 34, 36

United States v. State, 23 P.3d 117 (Id. 2001) 5

United States v. Union Pac. R.R. Co., 353 U.S. 116 (1957) 30

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 17

Walker v. Big Lost River Irrigation Dist., 856 P.2d 868 (Id. 993) 15

Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 29, 34

Washington v. Wash. State Commercial Passenger Fishing Vessel, 443 U.S. 658 (1979) 35, 36

Wash. Water Power Co. v. Fed. Energy Regulatory Comm'n, 775 F.2d 305 (D.C. Cir. 1985) 34

Watt v. W. Nuclear, Inc., 462 U.S. 36 (1983) 30

Winters v. United States, 207 U.S. 564 (1908) 14

Yellowbear v. State, 174 P.3d 1270 (Wyo. 2008) 20

CONSTITUTIONAL AND STATUTORY PROVISIONS, TREATIES, AND EXECUTIVE ORDERS

U.S. CONST. art. I, § 8, cl. 3 ..... 1, 6

U.S. CONST. art. II, § 2, cl. 2 ..... 2, 6

U.S. CONST. art. IV, § 3, cl. 2 ..... 2, 6

U.S. CONST. art. VI, cl. 2 ..... 2, 6

11 U.S.C. 1101 8

18 U.S.C. § 1 8

18 U.S.C. § 1151(a) 19

28 U.S.C. § 1257 1

43 U.S.C. § 666(a) 5, 14

Act of September 1, 1888, ch. 936, 25 Stat. 425 ..... passim

Act of February 10, 1891, 26 Stat. 745, ch. 129 35

Act of March 3, 1891, ch. 543, 26 Stat. 989 ..... 3, 13

Act of January 10, 1893, 27 Stat. 417, ch. 32 35

Act of January 20, 1893, 27 Stat. 420, ch. 39 35

Act of February 12, 1901, 31 Stat. 786, ch. 361..... 35

Act of Apr. 23, 1904, 33 Stat. 254..... 8

Act of April 28, 1904, 33 Stat. 567, ch. 1819..... 35

Act of March 3, 1905, 33 Stat. 1006, ch. 1440 33

Act of November 16, 1990, P.L. No. 101-602, 104 Stat. 3059..... 14

Desert Lands Act of March 3, 1877, 43 U.S.C. § 321, 19 Stat. 377 32

Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat 673..... 3, 9, 21

Executive Order of June 14, 1867 9

Idaho Code § 1-204..... 15

Idaho Code § 42-1406A..... 15

Idaho Code § 42-1411A..... 5, 15

OTHER AUTHORITIES

Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (2005) 6, 17

Ernest C. Baynard, PUBLIC LAND LAW AND PROCEDURE (1986) 17

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 1a-30a) is reported at 180 P.3d 1048. The order of the Supreme Court of Idaho denying the petition for rehearing (Pet. App. 136a-137a), and the remittitur to the District Court (Pet. App. 138a-139a) are unreported. The memorandum decision and order of the Idaho District Court (Pet. App. 31a-92a), the final recommendation of the Special Master to the District Court (Pet. App. 93a-100a), and the original order of the Special Master (Pet. App. 101a-135a) are unreported.

JURISDICTION

The decision of the Supreme Court of Idaho was rendered on February 19, 2008. A timely petition for rehearing was denied, and a final judgment entered, on April 3, 2008. On June 13, 2008, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including August 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the United States Constitution provides:

> [The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article II, § 2, cl. 2 of the United States Constitution provides:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

Article IV, § 3, cl. 2 of the United States Constitution provides, in relevant part:

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 10 of the Act of September 1, 1888, ch. 936, 25 Stat. 452 ("Townsite Act"):

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort

> Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

The Townsite Act is reprinted at Pet. App. 140a-154a.

The Act of March 3, 1891, ch. 543, 25 Stat. 452, provides that:

> That the Secretary of the Interior is authorized to grant rights of way into and across the Fort Hall Reservation in Idaho to canal, ditch, or reservoir companies [to go onto Fort Hall Reservation lands] for the purpose of enabling the citizens of Pocatello to thereby receive the water supply, contemplated by section ten (10) of [the Townsite Act], and may also attach conditions as to the supply of surplus water to Indians on said Fort Hall Reservation as may be reasonable and prescribe rules and regulations for the same.

The Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, ratified February 26, 1869 ("Second Treaty of Fort Bridger"), provides in relevant part:

> Article 11: No treaty for the cession of any portion of the reservations herein describe

> which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interest in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

INTRODUCTION

In the Western states, there is no commodity more precious than water. That is true today. It was true in 1888, when Congress enacted the Pocatello Townsite Act, Act of September 1, 1888, ch. 936, 25 Stat. 425 (the "Townsite Act"), to regularize the status of a large, unauthorized non-Indian settlement that had grown up at "Pocatello Junction" in the middle of the Fort Hall Indian Reservation. To legitimize the settlement, the Townsite Act ceded certain Reservation lands and made them available for purchase by the settlers. No water sources were appurtenant to the ceded lands. Thus, Congress, acting at the request of the executive branch, included Section 10 in the Townsite Act to afford Pocatello

> the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said

> town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

For well over a century, Pocatello has used waters diverted from Gibson Jack and Mink Creeks, which were on the Fort Hall Indian Reservation and were developed pursuant to the Townsite Act. To satisfy its future needs, Pocatello will also have to look to water resources on the Reservation.

In 1990, to confirm its Section 10 water rights, the City timely filed a claim with the Snake River Basin Adjudication ("SRBA") court.[1] That proceeding eventually reached the Supreme Court of Idaho, which declined to confirm the City's right under Section 10 on the grounds that: (1) the recognition of Pocatello's water right would diminish Indian treaty rights, and Congress's failure to secure

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[1] The SRBA was Idaho's first adjudication under the McCarran Amendment, which provides for joinder of the United States in certain cases relating to water rights. *See* 43 U.S.C. § 666(a) (2008). The SRBA court was required to resolve federally-based water rights claims, and to do so under federal law. Idaho Code § 42-1411A (2008). *See, e.g., United States v. State*, 23 P.3d 117 (Id. 2001); *Potlatch Corp. v. United States*, 12 P.3d 1260 (Id. 2000); *State v. United States*, 12 P.3d 1284 (Id. 2000); *United States v. City of Challis*, 988 P.2d 1199 (Id. 1999). Thus, federal constitutional and statutory issues were raised throughout the state court proceedings below.

tribal consent precluded diminishment;[2] (2) Congress did not properly manifest an intent to convey a vested water right because it did not use express words of conveyance, or explicit language that state water law did not apply on the Reservation; and (3) the history of the Idaho territory's prior appropriation system confirmed that Congress could not have granted Pocatello a federal water right, but only a right to seek to develop water on the Reservation under state law.

The loss of this water right will have significant consequences for the people of Pocatello, for whose benefit Congress enacted Section 10. As a growing municipality, Pocatello's need for a reliable and

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[2] This Court has used the term "treaty diminishment" to describe congressional action in pursuit of legitimate legislative objectives which, based on Congress's "clear and plain" intent, diminish tribal treaty rights. *See, e.g. South Dakota v. Yankton Sioux*, 522 U.S. 329, 343 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *United States v. Dion*, 476 U.S. 734 (1986). *See also City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 225 n. 2 (2005) (Stevens, J., dissenting). Courts have located the source of Congress's plenary power over Indian affairs most frequently in three constitutional provisions: the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2; and the Supremacy Clause, U.S. CONST. art. VI, cl. 2. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). "Court opinions most often refer to the commerce and treaty clauses as creating a general national power over Indian affairs . . . ." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 393 (2005 ed.). In addition, the federal government's authority to take property into trust for Indians is found in the Property Clause, U.S. CONST. art. IV, § 3, cl. 2.

certain water supply, confirmed by judicial action, cannot be overstated. Water continues to be a scarce resource in the arid West, made more so in regions like the Snake River basin of Eastern Idaho, where water resources have long been over-appropriated. Having been granted this right under Section 10, Pocatello should not be subject to the uncertainty of supply attendant to establishing its entitlement to water rights under state law.

Even more important, the Supreme Court of Idaho has announced a new rule of treaty diminishment with ramifications extending far beyond the general area of water rights and far beyond Pocatello, the Fort Hall Indian Reservation, or the State of Idaho. The Idaho court's new rule purports to limit the power of the federal government by conditioning Congress' authority to abrogate an Indian treaty on the consent of an affected tribe, and it extends the Caldwell "magic words" doctrine, previously limited to conveyances of the sovereign's lands, to treaty diminishment cases. *See Caldwell v. United States*, 250 U.S. 14, 20 (1919). The Idaho court's decision also turns the Supremacy Clause on its head, effectively holding that state law applies to Indian reservations unless Congress has expressly determined that federal law should apply.

The effect of these new principles will be broadly felt because the treaty diminishment doctrine applies in many substantive areas of law. The diminishment doctrine determines the impact of acts of Congress on tribal property and tribal jurisdiction. It is applied to determine whether statutes of general

applicability such as the Criminal Code, 18 U.S.C. § 1 *et seq.* (2008), and the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* (2008), apply to Indian tribes, and to interpret statutes of special applicability, such as the Townsite Act and surplus lands acts.[3] And, although the aim of the diminishment doctrine is to determine the impact of federal legislation on tribes, other parties have corresponding interests in jurisdictional disputes, so that the doctrine also affects the interests of non-tribal governmental units as well as private parties. The Idaho court's decision gives new impetus for parties to litigate already heavily litigated issues relating to the status of tribal property and jurisdictional boundaries. If the Idaho court is correct that Congress cannot diminish reservation boundaries or treaty rights without the consent of an affected tribe, established boundaries as well as the status of tribal property and rights throughout the West will be thrown into question.

The decision below is inconsistent with basic principles of federal law. It disregards the proper relationship of state and federal law, and it warrants review by this Court.

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[3] "Surplus land acts" are acts of Congress that cede land from Indian reservations and open that land up to settlement by non-Indians. *See, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) (determining jurisdictional effect of surplus lands acts, including the Act of Apr. 23, 1904, 33 Stat. 254, modifying boundaries of a Sioux reservation).

STATEMENT OF THE CASE

During the late 1980s, Pocatello was excluded from negotiations among the Tribes, the federal government and the State regarding the Tribes' water rights and the meaning of the 1888 Act. Pocatello therefore filed a timely water right claim with the Snake River Basin Adjudication. Pocatello contended that Section 10 granted the City a federal water right to remove waters from the Fort Hall Indian Reservation and convey them to the City for municipal uses. The SRBA Special Master, the District Court, and, finally, the Supreme Court of Idaho denied Pocatello's claim, ultimately concluding that Section 10 granted Pocatello a federal right to go on the Reservation and build structures for the conveyance of water, but that Pocatello's right to appropriate water was governed by state water law procedures.

A. History of the Fort Hall Indian Reservation and the Town of Pocatello.

President Andrew Johnson established the Fort Hall Reservation as a homeland for the Shoshone-Bannock Tribes by Executive Order in 1867. Executive Order of June 14, 1867, reprinted in EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS FROM MAY 14, 1855 TO JULY 1, 1912 at 75 (Washington, D.C.: U.S. Government Printing Office, 1912). In 1868, the Tribes and the United States entered into the Second Treaty of Fort Bridger, which established the terms and boundaries of the Reservation. Treaty with the Eastern Band

Shoshoni and Bannock, July 3, 1868, 15 Stat 673. Like many treaties made with Western tribes during that period, the Treaty contained a provision conditioning any cession of the Reservation on the written consent of a majority of adult male Indians.

Non-Indian railroad workers settled "Pocatello Station," located in the middle of the Fort Hall Reservation, initially to aid construction of an illegal railroad line across the Reservation and then to support the market that the railroad created. Exs. 5, 6.[4] Neither the trespass of the railroad nor that of the non-Indian settlers caused much concern at the outset. By the early 1880s, however, the Indian agent assigned to the Reservation reported disputes among the Railroad, the settlers, and the Tribes. Ex. 10. In 1885, the Department of Interior thought that the situation warranted the removal of the non-Indian community at Pocatello Junction and issued an order to that effect. But the settlers eventually persuaded the government to the contrary, and Congress authorized the executive branch to negotiate a cession of land from the Fort Hall Reservation to legitimize the settlement. *See* Exs. 11, 28, 32, 38.

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[4] "Ex. __" refers to exhibits attached to Pocatello's Motion for Summary Judgment dated January 18, 2005 (Exs. 1-47) or to Pocatello's Response to Respondents' Motion for Summary Judgment, dated March 3, 2005 (Exs. 48-75); those pleadings are identified as Exhibits 12 and 24 in the Clerk's Certificate of Exhibits of the record at the Supreme Court of Idaho, unless otherwise designated.

In May 1887, representatives of the United States Indian Agency and the railroad met with the Tribes. Ex. 11. A majority of the adult male members of the Tribes consented to a cession of approximately 1800 acres to form the new town of Pocatello. *Id.* The non-Indian settlers of Pocatello Junction had routinely used Reservation water sources over the years, but there was no discussion during the negotiations concerning Pocatello's water supply or whether the town would be granted a water right on the Reservation. Ex. 44.

In the ensuing months, officials in Washington began crafting the bill that would be adopted as the Townsite Act. The subject of formalizing the town's water supply first arose in correspondence between Peter Gallagher, the Fort Hall Indian Agent, and J.D.C. Atkins, the Commissioner of Indian Affairs, in November 1887. *See* Exs. 10, 15, 16, 19, 44. Agent Gallagher argued that Pocatello should be provided with a Reservation water supply, but the desire to avoid future conflict between Indians and settlers caused him to suggest that Pocatello be limited to the Portneuf River, which ran through a thin sliver of the ceded lands. Exs. 15, 18. Commissioner Atkins, however, thought that the Portneuf River could not provide enough good quality water to meet the town's needs. Exs. 11, 19. Thus, Commissioner Atkins

> deemed it advisable, as a matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the waters of any river,

> creek, stream, or spring flowing through the reservation lands in the vicinity of the town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches and canals, works, or other aqueducts, drain and sewerage pipes and other appliances on the reservation, as may be necessary to provide the town with proper water and sewerage facilities.

Ex. 11.

In February 1888, the Department of Interior transmitted to Congress a draft bill that included Commissioner Atkins's proposed language for Section 10. Ex. 11. During summer 1888, Congress was provided with alternative language that would have limited the City's water right to the Portneuf River, as suggested by Agent Gallagher. Exs. 16, 19.

On September 1, 1888, however, Congress adopted a version of the Townsite Act that included in Section 10 the broader language suggested by Commissioner Atkins. *See* page 2, *supra*. In 1890, Pocatello began using water from certain creeks on the Reservation. Exs. 60, 62, 64, 65. Pocatello claimed the right to use these water sources under the Townsite Act, and the City has used them ever since.

In 1890, the United States Indian Agency began receiving inquiries from private water companies that sought access to the Reservation to build water conveyance structures on behalf of the City. Ex. 20. The Agency was uncertain about whether Pocatello

could assign to independent agents its Section 10 rights to access the Reservation and build conveyance structures; the Agency therefore asked the Department of Justice to provide an analysis of Section 10. Deputy Attorney General George Shields concluded that private water developers could not access the Reservation because the right was limited to "citizens of Pocatello." *Id.*

In 1891, the Commissioner of Indian Affairs asked that Congress revisit the subject. Ex. 20. In doing so, he described Section 10 as a "grant" to the City, and he suggested that the water "privileges" granted to Pocatello would be more reliable if Congress extended to private corporations the authority to construct conveyance structures. *Id.* Congress responded by expressly extending to private entities the right of access to construct, operate, and maintain conveyances granted under Section 10 so as to "enable the citizens of Pocatello to receive the water supply, contemplated by section 10." Act of March 3, 1891, ch. 543, 26 Stat. 989, 1011 (1891).

B. History of the Dispute and Proceedings Below.

Pocatello, which is located in the southeastern part of present-day Idaho, has grown to have a population of approximately 55,000 people, and it is Idaho's second largest treated water provider. The Shoshone-Bannock Tribes continue to reside on the Fort Hall Indian Reservation in close proximity to Pocatello. *See* Map of Boundaries, Pet. App. at 155a. Today, the Reservation consists of 544,000 acres,

96% of which is owned by the Tribes. *See* http://www.shoshonebannocktribes.com (visited June 5, 2008). The disputed water right arises from water sources on the Reservation.

In 1985, the Tribes entered into negotiations with the United States and Idaho to resolve their claims to water in the Snake River. Pocatello asked to be included in the negotiations, but was denied that opportunity. Exhibit 4, Clerk's Certificate of Exhibits, Supreme Court of Idaho. The United States, Idaho, and the Tribes reached a settlement in 1990. Under that agreement, which relies on the Townsite Act to confirm the Tribes' *Winters* rights,[5] the Tribes may take as much as 581,031 acre-feet per year from various surface water and ground water resources. However, the parties to the settlement expressly agreed that Pocatello's rights to water under the Townsite Act were not determined by the settlement, and all of Pocatello's claims were reserved. The 1990 Agreement was ratified by Congress in the Act of November 16, 1990, P.L. No. 101-602, 104 Stat. 3059.

C. Snake River Basin Adjudication Court Proceedings.

In 1990, soon after the Idaho Legislature authorized the SRBA, Pocatello filed a claim for a federal water right under Section 10. The SRBA, which was commenced pursuant to the McCarran

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[5] *See Winters v. United States*, 207 U.S. 564 (1908) (when the sovereign establishes a reservation, it implicitly reserves water necessary to fulfill purposes of reservation).

Amendment, 43 U.S.C. § 666(a) (2008), and Idaho Code § 42-1406A (2008), is a "streamwide" adjudication, presenting the opportunity for water rights holders to adjudicate their water rights in an *in rem* proceeding. The SRBA has jurisdiction to adjudicate water rights established under federal law. Idaho Code § 42-1411A (2008). Under the SRBA, claims are heard in the first instance by a Special Master, who makes a recommendation to the SRBA District Court, which is a special jurisdiction division of the District Court. Idaho Code §§ 42-1406A (2008). *See also Walker v. Big Lost River Irrigation Dist.*, 856 P.2d 868, 871 (Id. 1993). The decision of the SRBA District Court is reviewable by the Supreme Court of Idaho. Idaho Code § 1-204 (2008). This proceeding presented Pocatello with its first opportunity to join all necessary parties, including the United States and the Tribes, in an adjudication of its Section 10 rights. The United States, the Shoshone-Bannock Tribes and the State of Idaho opposed Pocatello's claims under federal law, asserting that Section 10 did not grant a water right to Pocatello.

On cross-motions for summary judgment, the Special Master ruled that Section 10 created in Pocatello only a right to access the Reservation to remove water. Pet. App. at 134a.[6] On Pocatello's timely Petition to Challenge the Special Master's

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[6] Pocatello timely moved the Special Master to alter or amend her ruling. While she amended her ruling on certain issues, she did not alter her interpretation of Section 10. *See* Recommendation of the Special Master, Pet. App. 99a-100a.

Order, the matter was fully briefed and argued orally before the SRBA District Court. The SRBA District Court affirmed the decision of the Special Master, and held that Congress, in enacting Section 10, intended only to convey: (1) a right of access to the Fort Hall Reservation; and (2) the right to remove water arising on the Reservation by appropriation in accordance with state law. Pet. App. 91a.

D. Supreme Court of Idaho Proceeding.

The Supreme Court of Idaho affirmed the District Court's interpretation of Section 10 and rejected Pocatello's claim for a federal water right. Pet. App. 1a-2a. Noting that its decision was controlled by federal law, the Supreme Court of Idaho held that the language used by Congress signified its intent to convey to Pocatello a right of access to the Reservation, and the right to use water arising on the Reservation pursuant to state law, but not a federal water right. Pet. App. 7a.

According to the Idaho court, Section 10 did not diminish the Tribes' water rights because the Second Treaty of Fort Bridger required that the Tribes consent to any diminishment of their rights, and the Tribes had not given their consent to this diminishment. In the absence of such consent, Congress lacked the power to convey a federal water right to Pocatello. Pet. App. 28a-29a.

The Idaho court also applied the "express language" test of *Caldwell v. United States*, 250 U.S. 14 (1919), holding that Section 10 did not grant a water right to Pocatello because Congress had not

satisfied *Caldwell* by using the express "language of grant" or the precise term "water right." Pet. App. 7a-11a. According to the Idaho court, the only way for Congress properly to evidence "a transfer of property interest" under the Property Clause of the United States Constitution was to use such express terms as "grant bargain sell or convey." Pet. App. at 10a-11a.

Finally, the Supreme Court of Idaho, relying on the history of the development of the prior appropriation doctrine on the public domain (as opposed to a reservation),[7] found that Congress must have intended to convey to Pocatello only a right to access the Reservation to develop water supplies under state law, rather than a vested water right under federal law. Pet. App. 13a-17a. That was the case because, "under the Property Clause, it would require explicit language in order to overcome the right of the state to manage and allocate its own water resources." Pet. App. at 15a-17a.

REASONS FOR GRANTING THE PETITION

This case raises important questions concerning the nature and extent of congressional authority to

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[7] The public domain includes those lands "subject to sale or other disposal under the general land laws." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987), quoting Ernest C. Baynard, PUBLIC LAND LAW AND PROCEDURE § 1.1, at 2 (1986). The general land laws opened up certain federal land to settlement, and do not apply to Indian reservations. "Indian lands are not . . . public lands or part of the public domain and are thus not administered under the public land laws." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 391-92 (2005).

convey tribal property—in this case, the right to use water and land on a reservation. More generally, the decision below creates substantial confusion concerning the way in which federal statutes that effectuate treaty diminishment are to be construed by the state and federal courts. The rules adopted by the Supreme Court of Idaho are not simply incorrect, but will unsettle a broad range of matters previously thought settled, and are likely to encourage needless litigation.

The Supreme Court of Idaho has worked a revolution in the law. First, the Idaho court fundamentally altered existing federal law by holding that Congress cannot diminish Indian treaty rights unless it uses certain special words of art. Courts have not previously seen fit to place such a restriction on the exercise of Congress's constitutional power in this area. Second, the Idaho court misconstrued existing federal law by holding that Congress cannot lawfully diminish treaty rights with respect to water unless the tribe affected by the diminishment has consented to it. Here, too, courts have not previously restricted the constitutional powers of Congress in this way. Third, the Idaho court did fundamental violence to our system of federalism when it held that Pocatello, having been granted federal rights to enter the Reservation and build appropriate water delivery systems, was not also given a federal water right, but only the right to seek a right to water under state law. The Idaho court's assumption that state law prevails inside an Indian reservation (clearly "Indian country," and

hence subject to federal and tribal law) is not simply erroneous, but breathtaking in the depth of its error. *See* 18 U.S.C. § 1151(a); *DeCouteau v. Dist. County Court*, 420 U.S. 425, 428 n.2 (1975). Under the Supremacy Clause, federal law applies to reservations unless Congress has decided otherwise, and Congress has not decided otherwise in this case. *See, e.g., McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 171 (1973); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 147 (1996) (Souter, J., dissenting). Indeed, the Supremacy Clause sets aside state actions "that stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Confederated Tribes of Colville Indian Reservation v. State of Wash.*, 591 F.2d 89, 91 (9th Cir. 1979) (internal citations omitted).

The diminishment doctrine is an active and routinely applied doctrine in Indian law litigation. Whether Congress has diminished treaty rights is often a central question for the proper resolution of diverse issues presented to state and federal courts in a multitude of substantive contexts. In areas as diverse as criminal prosecutions, personal injury suits, and the enforcement of state hunting and fishing regulations, the key to such questions as jurisdiction, applicable substantive law, or the enforcement of property rights may depend on whether Congress has diminished treaty rights. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (to determine whether a tribal court has jurisdiction over a school

child's claim against a school district for injuries required a careful examination of extent to which tribal sovereignty has been diminished); *Yellowbear v. State*, 174 P.3d 1270, 1278-83 (Wyo. 2008) (state had jurisdiction to prosecute crime as act of Congress diminished the boundaries of reservation, and situs of the crime was therefore no longer in Indian country).

How courts are to decide whether Congress has properly effectuated a diminishment of treaty rights is therefore critical to the administration of justice in diverse areas. By repudiating settled treaty diminishment law, the Idaho court has not only created doctrinal confusion, but has thrown open for dispute the status of matters long thought settled.

The questions presented in this case warrant review by this Court.

I. THE SUPREME COURT OF IDAHO'S RELIANCE ON THE ABSENCE OF TRIBAL CONSENT TO SET ASIDE CONGRESS'S "CLEAR AND PLAIN" INTENT TO DIMINISH TREATY RIGHTS IS ERRONEOUS AND PRESENTS AN ISSUE OF FAR-REACHING IMPORTANCE THAT WARRANTS REVIEW BY THIS COURT.

1. The Supreme Court of Idaho held that when an Indian treaty requires tribal consent to diminish treaty rights, Congress lacks the constitutional power to diminish those rights absent such consent. The Idaho court held that

> in order to abrogate any treaty rights held by Tribes, a majority of adult male Indians must consent. Thus, the vote of a majority of adult male members of the Tribes was required in order to cede any water rights. Such consent was not given.

Pet. App. 28a. The Idaho court relied on the consent provision found in the Second Treaty of Fort Bridger, which states that a majority of the adult male membership of the Tribes must consent in writing to any future diminishment of the Reservation. Because the government complied with the consent provision as to the cession of the land that formed Pocatello, but not with respect to the grant of water rights, the Idaho court concluded that the treaty was not diminished as to the grant of a water right. Moreover, because Pocatello could not point to "a single instance where the Indians were apprised of the possibility that they were to lose some water rights" (Pet. App. 28a), the Idaho court concluded that Congress's language, conveying to Pocatello a right to use the waters "in common with" the Tribes, was not sufficient to convey a water right.

Thus, the court held that Congress had granted Pocatello a federal right to enter onto the Reservation and build structures for the removal of water, but not a federal water right. According to the court, Pocatello was required to seek a water right under state law. In other words, the Idaho court found that there was no diminishment of the treaty to vest a water right in Pocatello, but there

was diminishment to the extent that state water law was extended to govern waters within the boundaries of the Reservation.[8]

2. The Idaho court's ruling is inconsistent with decisions of this Court and with those of every federal court of appeals and state supreme or appellate court to have considered the question. All have held that the United States possesses plenary power over Indian affairs and may unilaterally abrogate Indian treaties with or without the consent of the tribe. *See, e.g., South Dakota v. Yankton Sioux*, 522 U.S. 329 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) ("*Rosebud*"); *Cherokee Nation v. S. Kan. R.R. Co.*, 135 U.S. 641 (1890); *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990); *State v. Larose*, 673 N.W.2d 157, 169 n.6 (Minn. App. 2003).

Many Western treaties contain a tribal consent provision. However, this Court has never invalidated any congressional abrogation of treaty rights on the ground that the government did not comply with such a provision. To the contrary, this

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[8] In addition, the Tribes were not asked to consent to the provisions of the Townsite Act which gave Pocatello the right to enter the reservation and build water delivery structures there. The Supreme Court of Idaho did not find that Congress acted unlawfully when it granted Pocatello those rights, but the court gave no explanation for why tribal consent was required in one case, but not the other.

Court has found that Congress validly diminished Indian treaty rights both in cases in which tribal consent was not requested and in cases in which it was actually refused. *See, e.g., Rosebud*, 430 U.S. at 587 (surplus land act diminished reservation despite failure to comply with treaty consent provision). This Court has even upheld the unilateral abrogation of treaty rights when the relevant tribe alleged that its consent had been obtained by fraud. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (adopting principle from *Chinese Exclusion Case*, 130 U.S. 581 (1889), that Congress's decision to abrogate a treaty raises non-justiciable political questions). This Court has never required Congress to acquire the consent of a tribe before allowing an act of Congress to diminish that tribe's treaty rights. *See, e.g., Hagen v. Utah*, 510 U.S. 399 (1994) (acts opening reservation to non-Indian settlement diminished tribe's sovereignty, notwithstanding tribe's refusal to consent, so that land was not "Indian country," but subject to state criminal jurisdiction); *United States v. Dion*, 476 U.S. 734 (1986) (holding Eagle Protection Act diminished tribe's implied rights to hunt without interference on reservation, without consent of tribe).

These decisions show that this Court has not previously assessed the validity of a diminishment by looking to the presence or absence of tribal consent. The Court looks to Congress, which is authorized to abrogate Indian treaties, and determines whether there is evidence of Congress's "clear and plain intent" to diminish. *See Yankton*

Sioux, 522 U.S. at 343; *Hagen*, 510 U.S. at 411; *Dion*, 476 U.S. at 738-39; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). If there is, that is the end of the inquiry. The Idaho court's decision, by contrast, disregards Congress's plenary authority to abrogate Indian treaties, and grants to the affected tribes a veto power that the courts will then be called upon to enforce. The Idaho court's view is based on a serious misapprehension of Congress's role, as well as its own.

3. The Idaho court's new treaty diminishment standard has widespread consequences for tribes and non-tribal governments. Courts rely on the diminishment doctrine to resolve all manner of conflicts over the meaning of federal statutes affecting Indian tribes. Some of those statutes narrowly relate to the affairs of a particular tribe, whereas others are laws of general applicability that relate to the entire nation. Tribal consent has not previously been thought necessary to validate congressional action of any type. *See Krystal Energy Co.*, 357 F.3d at 1057-62 (Bankruptcy Code provisions abrogate tribal sovereign immunity because Congress spoke "unequivocally" by using the term "foreign and domestic governments" and was not required to use the magic words "Indian Tribes"); *Pittsburg & Midway Coal Mining Co.*, 909 F.2d 1387 (10th Cir. 1990) (surplus lands acts restoring Indian lands to the public domain diminished tribe's lands); *Larose*, 673 N.W.2d at 169 n.6 (acknowledging congressional power to diminish Indian treaty rights without tribal consent); *State v. Wabashaw*, 740

N.W.2d 583, 591-92 (Neb. 2007) (federal statute granting certain states jurisdiction over crimes committed in "Indian Country" effectively abrogated treaty provision requiring tribal notification if crime committed by an Indian); *State v. Romero*, 142 P.3d 887 (N.M. 2006) (Pueblo Lands Act did not diminish boundaries of Indian reservation for purposes of determining state criminal jurisdiction).

The Idaho court's decision is contrary to established law and effectively creates a new rule of treaty diminishment—no act of Congress, not even a statute of general applicability, may be held to diminish tribal jurisdiction or tribal property unless it can be shown that the consent of the affected tribe has been sought and obtained. This new tribal veto over acts of Congress not only lacks any constitutional basis, but seriously impairs the power of Congress to abrogate treaties. In addition, the Idaho court's new rule promises to create enormous practical mischief. Over the years, Congress has altered the boundaries of countless Indian reservations, and it has often done so without seeking or obtaining the consent of the affected tribe. The invalidation of such congressional acts would throw into question the status of lands that were once part of an Indian reservation (as well as any assertion of non-tribal jurisdiction over them) and would necessarily lead to further disputes and litigation. Indeed, the Idaho court's holding has created great uncertainty in a sensitive area of Indian law that is already rife with litigation. The decision below will result in increased litigation

between non-Indian governments and tribes over the boundaries of reservations and the status of tribal treaty rights.

II. THE SUPREME COURT OF IDAHO'S ERRONEOUS EXTENSION TO DIMINISHMENT CASES OF THE RULE OF *CALDWELL V. UNITED STATES*, WHICH REQUIRES THE USE OF EXPRESS WORDS OF CONVEYANCE TO SIGNIFY THE SOVEREIGN'S INTENT TO CONVEY ITS OWN LANDS, WARRANTS REVIEW BY THIS COURT.

1. The Supreme Court of Idaho rejected Pocatello's claim to a water right on the ground that Section 10 does not contain explicit and express terms of conveyance. In doing so, the Idaho court cited *Caldwell v. United States*, 250 U.S. 14, 20 (1919), for the proposition that when a court is construing a federal statute granting privileges, "nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government." Pet. App. 7a-8a.

Thus, the Idaho court extended *Caldwell* to the treaty diminishment area and held that Section 10 did not sufficiently express Congress's intent to convey a water right to Pocatello because Congress did not include any of the traditional terms of conveyance such as "grant" or "convey," or the words "water right." Pet. App. 10a-11a. However, the Idaho court also held that the language Congress used in Section 10 was sufficiently express to grant

Pocatello the right to enter onto the Reservation, the right to build conveyance structures on the Reservation, and the right to remove water from the Reservation—upon Pocatello's compliance with state water law. Pet. App. 17a.

2. Under *Caldwell*, Congress must use express language to manifest its intent to convey property. This rule, which requires Congress to use the established language of conveyance—magic words that stand alone without resort to interpretation—has not been applied by any other court to treaty diminishment cases. Indeed, this Court has declined to hold Congress to an express language standard where Indian tribal property is concerned. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), for example, the Tenth Circuit applied the *Caldwell* standard, and thus denied a tribal claim to the bed of the Arkansas River on the ground that the relevant treaties did not contain clear and explicit language investing the tribe with title to the bed. This Court reversed, holding that treaties between the United States and Indian nations are not to be considered "exercises in ordinary conveyancing" by the federal government, and therefore found for the tribe based on a diminishment analysis. *Id.* at 631.

3. In lieu of a "magic words" test, this Court has undertaken a holistic analysis to determine whether Congress intended to diminish a tribe's treaty rights or reservation. This Court has described the inquiry as an examination of an act of Congress for indication of "baseline intent" to diminish treaty rights. *Hagen*, 510 U.S. at 415; *see also Rosebud*,

430 U.S. at 592. Under that test, the courts are required to examine the historic context surrounding the adoption of the statute, the language and structure of the statute, and subsequent patterns of settlement and use of the property in question. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Rosebud*, 430 U.S. at 586-88 (examining the language of the act, surrounding circumstances, and executive branch documents that were part of the legislative history); *Shawnee Tribe*, 423 F.3d at 1220-29 (considering language of the act, historical context of its enactment, and subsequent treatment of the area in question, including settlement patterns); *Pittsburg & Midway Coal Mining Co.*, 909 F.2d at 1393 (same).

4. Further, this Court has expressly rejected any trend toward requiring Congress to use express or explicit language to diminish Indian treaty rights—whether the diminishment involves issues of sovereignty or of property rights. *Rosebud*, 430 U.S. at 588 n.4 (express language of termination is not required). For example, in *Hagen*, 510 U.S. at 399, this Court rejected the argument that the diminishment doctrine could be reduced to a "clear statement rule":

> The Solicitor General, appearing as *amicus* in support of petitioner, argues that our cases establish a "clear-statement rule," pursuant to which a finding of diminishment would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional

> commitment from Congress to compensate the Indians . . . . We disagree. First, although the statutory language must "establis[h] an express congressional purpose to diminish," *Solem*, 465 U.S., at 475, we have never required any particular form of words before finding diminishment, *see* [*Rosebud*, 430 U.S. at 588 & n.4].

Id. at 411. Many decisions by the lower federal courts and the state courts are to the same effect. *See, e.g., Krystal Energy Co.*, 357 F.3d at 1058; *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052, 1060 (S.D. Cal. 1992) ("[f]rom *Rosebud* and *Dion* it is clear that a statute need not on its face express an intent to abrogate Indian treaty rights"); *State v. Greger*, 559 N.W.2d 854, 861 (S.D. 1997) (recognizing "no particular form of words is required" for diminishment); *State v. Perank*, 858 P.2d 927, 936 (Utah 1992) (holding that statutory language need not "expressly sever tribal jurisdiction to effectuate a diminishment").

To abrogate treaty rights, Congress need not make its intent "unmistakably clear" in a single section of a statute, *Krystal Energy Co.*, 357 F.3d at 1058, and it need not specify all potentially conflicting treaty rights that it intends to abrogate. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 479 n.22 (1979). "Even in the absence of a clear expression of congressional purpose in the text," courts may determine, based on a holistic review of the language

and background of the statute, that Congress intended diminishment. *Yankton Sioux*, 522 U.S. at 351. Thus, the diminishment doctrine recognizes the peculiar complexity of the matters inquired into and demands that reviewing courts piece together the available evidence to ascertain congressional intent. To do otherwise would risk negating Congress's clear intent based on its inartful expression.[9]

5. The decision below is contrary to basic constitutional principles. Congress has plenary constitutional authority over Indian tribes and tribal property. For the courts to require the inclusion of "magic words" before finding that Congress intended to diminish tribal treaty rights puts this broad power in jeopardy. Indeed, it is for this reason that the courts have seen fit to create few "express language" rules to circumscribe congressional authority. *See, e.g., Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (involving conveyance of federal property to non-governmental entities); *United States v. Union Pac. R.R. Co.*, 353 U.S. 116 (1957) (same); *Governor of Kan. v. Kempthorne*, 516 F.3d 833, 841-45 (10th Cir. 2008) (involving waiver of United States' sovereign immunity); *United States v. Dist. Court for Eagle County*, 401 U.S. 520 (1971) (same). The origin of such rules in judge-made law, and the implications they entail with respect to the separation of powers,

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[9] The contrary position, adopted in this case by the Supreme Court of Idaho, has never commanded a majority of this Court. For example, in *Rosebud*, Justice Marshall took that position in dissent, 430 U.S. at 618-20, while a majority of the Court specifically rejected it. *Id.* at 588 n.4.

argues for limiting the scope of their application rather than applying them expansively.

III. THE GROUNDS RELIED UPON BY THE SUPREME COURT OF IDAHO FOR ITS CONCLUSION THAT CONGRESS INTENDED TO GRANT POCATELLO A RIGHT TO USE WATER ARISING ON THE FORT HALL RESERVATION ONLY PURSUANT TO STATE LAW ARE CONTRARY TO THE SUPREMACY CLAUSE AND WARRANT REVIEW BY THIS COURT.

1. According to the Idaho court, Section 10 did not grant Pocatello a federal water right, but only the right to "access the surface waters on the Reservation, along with an opportunity to establish a water right under state law." Pet. App. 7a. The court reasoned that:

> it would require explicit language [in Section 10] in order to overcome the right of the state to manage and allocate its own water resources [on the Reservation]. There being no such explicit language in Section 10, state water law controls any claims by the City . . . .

Pet. App. 17a.

2. The Idaho court's reasoning is fatally flawed because of its starting premise: that the right to manage and allocate water resources on the Fort Hall Indian Reservation belongs to the state, rather than the federal government. Federal law—not state law—controls water sources on federal and tribal

lands: "[w]ater use on a federal or Indian reservation is not subject to state regulation absent explicit federal recognition of state authority" to do so. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52-53 (9th Cir. 1981) (holding state regulation of waters arising within reservation to be entirely inappropriate). *Accord Cappaert v. United States*, 426 U.S 128, 145 (1976) (holding water right attendant to reservation was governed by federal, not state, standards); *Matter of Beneficial Water Use Permits*, 923 P.2d 1073, 1083 (Mont. 1996); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114-15 (Wyo. 1988), *aff'd by equally divided court*, 492 U.S. 406 (1989) (presumption that federal law controls water rights on Indian reservations).

Contrary to the Idaho court's conclusion, neither historical developments nor the Desert Lands Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. § 321, suggest a contrary result. The Desert Lands Act was enacted to ensure that non-navigable waters located on the public domain would be subject to the jurisdiction of the states. Pet. App. at 15a-16a (*citing California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935)). But that statute did nothing to alter the federal government's jurisdiction over waters arising on federal reservations, including Indian reservations. Thus, in *FPC v. State of Oregon*, 349 U.S. 435, 445-49 (1955) ("*Pelton Dam*"), this Court held that Oregon could not require compliance with state water law in connection with

use of waters arising on a federal Indian reservation. *Id.* at 445.[10]

3. State law applies to water rights arising on Indian reservations only if Congress has said so expressly. Of course, Congress could have ceded to Idaho the right to manage and allocate water rights on the Reservation, and it could have required Pocatello to comply with territorial or state law as a condition of using water under Section 10.

In the Act of March 3, 1905, ch. 1440, 33 Stat. 1006 ("1905 Act"), for example, Congress conveyed the right to use waters on a reservation in connection with hydroelectric facilities, but expressly conditioned that grant on compliance with Washington state water law. The 1905 Act provided:

> That the right to the use of the waters on the Spokane River where the said river forms the southern boundary of the Spokane Indian

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[10] State law may apply to manage or administer federal and tribal water, but only to the extent that such waters may be subject to administration following a McCarran Act adjudication, which necessarily considers controlling federal issues. *See, e.g., Big Horn*, 753 P.2d at 94 (holding that "[f]ederal law has not preempted state oversight of reserved water rights . . . [but] water rights [arising on Indian reservations] in state adjudications must be judged by federal law," and therefore the role of the state is "not to apply state law, but to enforce the reserved rights as decreed under principles of federal law"); *see also United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1934).

> Reservation may . . . be acquired by appropriation under and pursuant to the laws of the State of Washington.

Section 1, 33 Stat. 1006; *see also Wash. Water Power Co. v. Fed. Energy Regulatory Comm'n*, 775 F.2d 305, 312 (D.C. Cir. 1985) (construing 1905 Act) ("[Absent this express language, the Supremacy Clause would have made] an[y] attempt to appropriate water solely under Washington law from a stream flowing through a federal Indian reservation . . . precarious indeed"). *See also United States v. New Mexico*, 438 U.S. 696, 701 (1978) (enforcing state law jurisdiction over Forest Service's claims because the agency's organic act expressly required compliance with state law).

But that is not the case here. Section 10 contains no language that would affirmatively require Pocatello to comply with state law as a condition to the exercise of its federal water right. Absent such language, the Supremacy Clause precludes the imposition of any such requirement. Congress will be found to have extended state regulation to tribal land only if it has specifically directed such an incursion. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979); *Antoine v. Washington*, 420 U.S. 194, 204 (1975).[11]

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[11] The statute involved in this case is far from unique. Congress has enacted statutes granting access to Indian reservations for the purpose of withdrawing water in at least four other Western states. If these statutes are likewise

4. The Idaho court's erroneous conclusion that Congress intended state law to apply to its Section 10 grant is particularly perplexing because it follows from a wholly unnecessary analysis. Indeed, the precise phrase used by Congress in Section 10—"in common with" the Tribes—was construed by this Court in *Washington v. Wash. State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 677-78 (1979) ("*Fishing Vessel*"), as guaranteeing the right to share in a quantity of a resource. The Idaho court not only declined to follow this Court's construction of that language, it adopted an interpretation (*see*

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interpreted to subject parties accessing reservation water under a federal right to state regulation, the likely result will be additional conflict and litigation. *See, e.g., An Act to permit the construction of a smelter on the Colville Indian Reservation, and for other purposes*, April 28, 1904, 33 Stat. 567, ch. 1819 (granting company right to construct smelter on reservation and divert water of reservation); *An Act To authorize Arizona Water Company to construct power plant on Pima Indian Reservation in Maricopa County, Arizona*, Feb. 12, 1901, 31 Stat. 786 (granting company right to operate water power plant on the reservation and divert water of reservation); *An act granting to the Blue Mountain Irrigation and Improvement Company a right of way for reservoir and canals through the Umatilla Indian Reservation in the State of Oregon*, Jan. 10, 1893, 27 Stat. 417, ch. 32, (granting company right to build canal and divert water of the reservation); *An act granting to the Yuma Pumping Irrigation Company the right of way for two ditches across that part of the Yuma Indian Reservation lying in Arizona*, Jan. 20, 1893, 27 Stat. 420, ch. 39, (same); *An act granting the Umatilla Irrigation Company a right of way through the Umatilla Reservation in the State of Oregon*, Feb. 10, 1891, 26 Stat. 745, ch. 129 (granting company right of way through Reservation for diverting water off the reservation).

Pet. App. 22a-26a) that this Court expressly rejected in *Fishing Vessel* that "in common with" conveyed only a right of access and a right to develop a resource pursuant to state law. *See* 443 U.S. at 676-78.[12]

If the Idaho court had interpreted this language in conformity with *Fishing Vessel*, it could have avoided its erroneous conclusion, which was both unnecessary and contrary to the Supremacy Clause. *See, e.g., Pelton Dam*, 349 U.S. at 449; *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

The Supreme Court of Idaho has determined that Congress must expressly say so when it does not intend to cede federal jurisdiction over Indian reservations to state officials. Otherwise, in the Idaho court's view, jurisdiction will pass from Congress to the states. That proposition is contrary to settled law, and to principles of federal supremacy. The decision below clearly warrants review by this Court.

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[12] The Idaho court effectively adopted Justice Powell's dissent, which took the position that the language of the treaties, granting tribes "the right to take fish . . . in common with all citizens of the territory," granted only a "right of access to fish," and not a specific percentage of the fish runs, as the majority held. *Fishing Vessel*, 443 U.S. at 698.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1, 2008

APPENDIX

Appendix A

Supreme Court of Idaho
CITY OF POCATELLO, Appellant
v.
STATE of Idaho, UNITED STATES OF AMERICA and the SHOSONE-BANNOCK TRIBES, Respondents

Docket No. 33669
In Re SRBA
Case No. 39576
Subcase No. 29-11609

2008 Opinion No. 28
February 19, 2008

Snake River Basin Adjudication, District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. John M. Melanson, District Judge.

The district court's summary judgment order is affirmed.

JONES, J.

The City of Pocatello filed a claim in the Snake River Basin Adjudication (SRBA), asserting it had been granted a federal water right under an 1888 Congressional act. A special master in the SRBA determined that no such right existed. The

district court affirmed on appeal, as does this Court.

I.

President Andrew Johnson designated the Fort Hall Indian Reservation for the use of certain bands of the Shoshone and Bannock Tribes ("Tribes") by virtue of an 1867 executive order. The boundaries and terms of the Reservation were established the next year in the Second Treaty of Fort Bridger. The Treaty contained provisions for providing services on the Reservation, education for the Tribes, and allotments of land for farming by tribal members. The Treaty specifically required the written consent of a majority of adult male Indians for the cession of any portion of the Reservation.

In 1878, the Utah Northern Railway Company (the "Railroad") built a north-south line across the Reservation without permission from either the Tribes or the United States government. A few years later, the same company negotiated with the Tribes to build an east-west railroad line. The Tribes granted a right-of-way, which Congress approved. The lines intersected in the middle of the Reservation at a site called Pocatello Junction.

A settlement of non-Indian residents sprang up at the intersection. The settlers were trespassers, being on the Reservation without permission. In 1885, officials from the United States Department of the Interior ordered the

removal of the trespassers, to no avail. The settlement continued, and federal authorities eventually came to realize they would not be able to remove the settlers without violence and bloodshed. A group of citizens from the town sent a petition begging not to be removed from the site, as many of them were railroad employees who would lose their jobs if forced to move. As the situation grew ever more tense, the Railroad asked the Secretary of the Interior to assist in negotiations with the Tribes.

In 1887, the Secretary of the Interior assigned Inspector Robert S. Gardner and Indian Agent Peter Gallagher, the agent in charge of the Reservation, to negotiate with the Tribes. Together, they negotiated a Cession Agreement in an intense one-day session. The Agreement was not without dissent. The Tribes were reluctant to cede any reservation land to non-Indians. However, Agent Gallagher persuaded the Indians that the cession would give them enough money to build irrigation ditches and shore up their farming industry, so a majority of male members of the Tribes voted to approve the Agreement. The Agreement transferred the Pocatello Townsite to the citizens of Pocatello and a right-of-way to the Railroad for its existing tracks. The Agreement made no mention of water or water rights.

After the Cession Agreement was approved by the Tribes, but before it was enacted into law, the question arose as to how the new city would

obtain a water supply. In late 1887, the Commissioner of Indian Affairs, J.D.C. Atkins, began discussions with Agent Gallagher in this regard. Commissioner Atkins wrote to say, "The source of the water supply thus being, according to your statement, outside the limits of the proposed town-site . . . [and] on the reservation lands, I have construed your suggestion to mean that some guarantee in regard to water privileges, should be provided so far as the Indians and the reservation are concerned. . . " He proposed language to address this issue for inclusion in the legislation approving the Cession Agreement.

In a message to Congress, dated February 3, 1888, Commissioner Atkins called attention to the need to secure a water supply for the newly-formed City of Pocatello. In pertinent part, the message states:

> Inasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its supply of water, I have deemed it advisable, as a matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the waters of any river, creek, stream, or spring flowing through the reservations lands in the vicinity of the town, with the right of access at

> all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as may be necessary to provide with proper water and sewerage facilities.

Atkins provided Congress with the proposed legislation to approve the Cession Agreement. The legislation included the following provision:

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

This language became Section 10 of the bill approving the Cession Agreement. Act of

September 1, 1888, ch. 936, 25 Stat. 452 (the "1888 Act").

One hundred and two years after passage of the 1888 Act, the City asserted Section 10 of the Act as the basis for its present claim. In 1990, the City filed a claim in the SRBA for a federal reserved water right, as an alternative to 38 separate prior claims based on state law.

The United States, the State of Idaho, and the Shoshone-Bannock Tribes (the "Opposing Parties") filed objections to the City's federal claim. All took the position that the 1888 Act did not create a federal reserved water right. All parties moved for summary judgment before a Special Master of the Snake River Basin Adjudication. In its motion, the City departed from its notice of claim and stated Section 10 gave the City "an express grant of a water right" via the Property Clause of the U.S. Constitution, rather than a reserved water right. The Special Master granted summary judgment to the Opposing Parties. The Master recommended the City's claim not be confirmed in a partial or final decree and denied the City's motion to alter or amend the recommendation.

The City challenged the Special Master's decision in district court. The district court affirmed the Special Master. The SRBA court determined Section 10 granted, at most, a right of access for appropriating water, not a water right.

The court disallowed the City's claim for a water right and certified its order for appeal. The City appealed to this Court.

II.

The question presented is whether Section 10 of the 1888 Act granted a federal water right to the City of Pocatello. We hold the Act created no such right. Rather, it granted the City access to surface water sources on the Reservation, along with the opportunity to establish a water right under state law.

A.

This Court employs the same standard of review as the district court when ruling on a motion for summary judgment. *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c). If there is no genuine issue of material fact, "only a question of law remains, over which this Court exercises free review." *Watson*, 141 Idaho at 504, 112 P.3d at 792. Interpretation of a statute is a question of law over which this Court exercises free review. *Gooding Cty. v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002). Where a federal statute grants privileges it must be strictly construed favorably to the government and "nothing passes but what is conveyed in clear and

explicit language – inferences being resolved not against but for the government." *Caldwell v. United States*, 250 U.S. 14, 20 (1919).

B.

The City cited Section 10 of the 1888 Act as the basis for its SRBA claim to a federal reserved water right. The claim states, "[t]he federal reserved water right claimed herein is in the alternative to, and not in addition to, water rights claimed by the city under state law." In the proceedings below, the City subsequently abandoned its reserved water right claim and amended its legal theory. It became the City's position that Section 10 of the 1888 Act expressly granted it a water right under the Property Clause of the U.S. Constitution. U.S. Const., art. IV, § 3, cl. 2. Thus, we need not address the reserved right claim.

i.

The City argues that the district court imposed a "magic words" test to deny it a federal water right. However, that is not the case. The district court merely considered the plain language of Section 10 and found it did not convey a federal water right. Because this issue turns on statutory interpretation, we exercise free review. *Gooding Cty.*, 137 Idaho at 204, 46 P.3d at 21.

When interpreting a statute, the Court begins with the plain language. "[I]f the statutory language is clear and unambiguous, the Court need

merely apply the statute without engaging in any statutory construction. . . . Statutory interpretation begins with the words of the statute, giving the language its plain, obvious and rational meanings." *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Further, the Court "[w]ill resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws. There is no need to go beyond the language of the statute, when that language is clear and unambiguous." *Potlatch Corp. v. United States*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (2000) (citation and internal quotations omitted).

Section 10 reads:

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to

> provide said town with proper water and sewerage facilities.

The City contends the language of Section 10 is clear and plainly conveys it a water right.

No one disputes Congress' power to make a grant of water rights. The federal government derives its power to dispose of the lands and waters of the United States under the Property Clause, U.S. Const., art. IV, § 3, cl. 2. "The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal government owns the lands, and Congress is invested by the Constitution with the power of disposing of the same. . ." *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 272 F. 356, 357 (9th Cir. 1921), *cert. granted* 44 S.Ct. 135, *affirmed* 266 U.S. 85 (1924). However, the Court went on to say, "the states hav[e] jurisdiction to provide for the appropriation and beneficial use of the waters of the state. . ." *Id.* Merely because Congress *could* have granted the City a federal water right does not mean it did so in this case.

The language of Section 10 provides a right of access to water sources on the Reservation and the right to construct, operate, and maintain water facilities to allow the City to be served by those sources. However, as the district court concluded, Section 10 did not "contain historically recognized and accepted terms of conveyance such as 'grant' 'bargain' 'sell' or 'convey' evidencing a transfer in a

property interest." The statute does not purport to grant a property interest, nor does it make reference to a "water right." Section 10 contains no language defining the nature and scope of any water right supposedly granted. The district court contrasted the language of Section 10 with Section 11 of the same Act, which provides, "[t]hat there be, and is *hereby granted*, to the said Utah and Northern Railway Company a right of way." (emphasis added). The court correctly concluded that Congress would have used more exacting language if it had intended to grant a water right to the City. This is especially true, given the rule of strict construction that federal courts apply to statutes in which the government grants privileges or relinquishes rights. As noted above, such statutes are construed to pass nothing "but what is conveyed in clear and explicit language." *Caldwell v. United States*, 250 U.S. at 20.

In support of its claim, the City cites *Byers v. Wa-Wa-Ne*, 86 Or. 617, 169 P. 121 (1917). In that case the Oregon Supreme Court determined that a license to a non-Indian on a reservation had been converted by Congress into a water right. There, the Indian agent in charge of the Umatilla Indian Reservation granted a permit to a non-Indian to build a ditch through part of the reservation. *Id.* at 620-621, 169 P. at 122. The permission stated, "In granting this permission to construct the said water ditch, it is upon the express condition that *no permanent rights shall attach or become vested*. . ."

Id. (emphasis added). Fifteen years later, in 1885, Congress passed an allotment act that stated in part, "That the water-right across a portion of said reservation . . . for manufacturing, irrigating, and other purposes, *be confirmed* and continued. . ." *Id.* at 628, 169 P. at 124-25 (emphasis added). The Oregon Supreme Court examined this language and determined that the non-Indian received a water right because of the "confirmed" language of the allotment act. It examined a number of authorities on the legal force and effect of using the word "confirmed," and found it operated as a conveyance of a right. *Id.* at 629-30, 169 P. at 125. Thus, the Oregon Supreme Court found it could "unmistakably grasp the legislative intent which is controlling in the interpretation of this statute. . . . This right was infirm and Congress confirmed it." *Id.* at 630-631, 169 P. at 125. The same is not true in the case at bar. The language of Section 10 is far less explicit than that of the allotment act in *Byers*. As the district court pointed out, Section 10 contains none of the traditional terms of conveyance that would indicate that Congress actually granted a right. Indeed, Section 11 of the 1888 Act "grants" the Railroad a right of way, language Congress could easily have used in Section 10 but did not. Nor does the 1888 Act use the language "water-right," as does the 1885 allotment act. No Congressional action subsequent to 1888 "confirmed" any water right for the City. Thus, *Byers* provides no support for the City.

A plain reading of the statutory language shows that the City was not granted a federal water right. Even if the language were determined to be ambiguous, the City's claim would fail. In construing a statute, this Court examines the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. *Hagerman Water Right Owners*, 130 Idaho at 733, 947 P.2d at 406. Moreover, "the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time." *Id.* As this Court has stated:

> It is . . . improper to construe [statutes] in the abstract, without taking into con-sideration the historical framework in which they exist. . . .Correlatively, such information is also relevant when deciding what the statute means to others because it is important to know how people affected by an act understand it.

Id. at 733-4, 947 P.2d at 406-7 (quoting Sutherland Stat. Const. § 49.01 (5th ed. 1992)). We first consider the historic context of the 1888 Act.

Section 10 must be viewed in the context of the development of the arid western states. The settling of the western United States was a long and arduous process. A small number of people were charged with conquering vast territory.

Irrigating the arid lands of the west required one precious resource more than any other: water. "From a line east of the Rocky Mountains almost to the Pacific Ocean, and from the Canadian border to the boundary of Mexico, an area greater than that of the original thirteen in the main, constituted a desert, impossible of agricultural use without artificial irrigation." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 156 (1935). Initially, the task of settling the land fell to a few pioneers with little help from territorial or federal government. *Id.* These settlers depended on a system of appropriation to determine water rights, rather than deferring to the common law doctrine of riparian rights. *Id.* at 157. Eventually, the state, territorial, and federal governments recognized that the only way the arid lands of the west could be settled and turned to agricultural use was to officially recognize the law of appropriation as the law of the land. *Id.* at 157-58. To that end, Congress passed laws regarding homesteading, mining, and other matters. The import of these laws was clear: the federal government deferred to the states on the matter of controlling western waters. "The public interest in such state control in the arid land states is definite and substantial." *Id.* at 165. In *California Oregon Power Co.*, the Supreme Court merely affirmed a doctrine the western state courts had long recognized – the law of appropriation. *See, e.g., Eddy v. Simpson*, 3 Cal. 249, 252 (1853) (California Supreme Court

establishes that water rights are based on first possession); *Lobdell v. Simpson*, 2 Nev. 274 (1866) (Nevada Supreme Court recognizes and applies prior appropriation doctrine); *Coffin v. The Left Hand Ditch Co.*, 6 Colo. 443 (1882) (Colorado Supreme Court rejects riparian rights and adopts appropriation); *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 378, 18 P. 52 (1888) (Supreme Court of the Territory of Idaho recognizes that first appropriation for beneficial use gives superior right).

Congress responded to the need for clarification of water rights with several laws in the 1860s and 1870s. The most important of these for our purposes is the Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377. The crucial portion of the Act stated that all water not claimed by appropriation "shall remain and be held free for the appropriation and use of the public." *Id.* In construing the Desert Land Act, the Supreme Court stated, "Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest." *California Oregon Power Co.*, 295 U.S. at 163. Instead, the Court held,

> [F]ollowing the act of 1877, if not before, all nonnavigable waters then a part of the public domain became

> publici juris, *subject to the plenary control of the designated states*, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.

Id. at 163-64 (emphasis added).

Deference to state water law has since continued uninterrupted. For example, Congress passed the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, in order to create massive projects intended to fully reclaim the arid lands. Projects built under the Act were required to comply with state water law. In a fairly recent dispute involving the Reclamation Act, the U.S. Supreme Court conducted an extensive review of federal deference to state water law. The Court stated, "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). Ultimately, the Court recognized only two restrictions on the States' exclusive control of water: reserved rights on federal government property and navigation servitude (neither of which

is involved here). *Id.* at 662 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899)).

Based on the long-standing and firmly established policy of deference and absent express Congressional action to the contrary, state water law controls. While Congress can certainly grant water rights under the Property Clause, it would require explicit language in order to overcome the right of the state to manage and allocate its own water resources. There being no such explicit language in Section 10, state water law controls any claims by the City. If this Court were to determine Section 10 granted a federal water right, that right would conflict with a century's-worth of federal deference to state law.

Neither does the background for inclusion of Section 10 in the 1888 Act support the City's position. When the Cession Agreement was being negotiated with the Tribes, no mention was made of water rights, either for the Tribes or the City, or of non-Indians accessing or conveying water over those lands retained in the Reservation. After the Cession Agreement was signed on May 27, 1887, Agent Gallagher suggested to Commissioner Atkins that legislation approving the Cession Agreement should contain a provision regarding water supply and sewage for the proposed town of Pocatello. In a letter directed by Atkins to Gallagher on December 29, 1887, Atkins noted that the contemplated

source of the city's water supply was on Reservation lands, outside the limits of the proposed townsite. Atkins proposed language along the lines subsequently included as Section 10 in the bill in order to provide "some guarantee to water privileges . . . so far as the Indians and the Reservation are concerned." In his message to Congress, accompanying the draft of legislation to approve the Cession Agreement, Atkins noted that he deemed it advisable to insert the Section 10 language "[i]nasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its water supply."

Prior to enactment of the 1888 Act, Gallagher again wrote to the Commissioner, asking "to be informed what rights are guaranteed to these tribes, under treaty & executive orders," to the Blackfoot and Snake Rivers, pointing out that white settlers along the opposite side of the Blackfoot River appeared to be constructing ditches and dams that had left the Indians without water to irrigate their crops. An acting Commissioner responded on August 20, 1888:

> I do not find that the treaty makes any provision relating to the use of water in the streams.
>
> Water rights and privileges are regulated by the laws of Idaho, and doubtless the Indians are entitled to

> the same rights as white settlers would be under similar circumstances.

The acting Commissioner continued:

> I have to state that white men have no right to construct bridges, dams, flumes, or reservoirs on the reservation, nor have they the right to construct abutments, piers, or other works upon the reservation banks of the boundary streams. Such authority can only be given by Congress.

Several weeks later Congress passed the 1888 Act.

The discussions leading up to enactment of Section 10 did not relate to water rights and who should have them but, rather, water sources and how to ensure that the City had access to them. That is, the discussion focused on the fact that most surface water resources were located on Reservation lands and that the City would need to have access to those sources and the ability to convey water from them in order to have a water supply. Because of the trespass problems leading up to the negotiation of the Cession Agreement, it was rather clear that there needed to be a right of way approved by Congress. The participants in the discussion clearly indicated that the issue of water rights – how they were to be obtained and granted – was a matter of state law. Congress, however,

had to provide the necessary access for enjoyment of any state water rights.

Events subsequent to the passage of the legislation confirm this state of affairs. After the 1888 Act was passed, the Idaho Canal Company began to build a canal from the Snake River to the City. The president of the company wrote to Commissioner Atkins, explaining that the citizens of Pocatello wanted to contract with his company to construct the canal and bring water to the City. He inquired of the Commissioner whether his crews could go onto the Reservation in order to access the water provided in Section 10. The Commissioner sought the advice of Assistant Attorney General George Shields.

In an 1891 letter interpreting Section 10, Assistant Attorney General George Shields opined that Section 10 was a mere license:

> In view of the fact that the provision of said section of the statute is in derogation of the rights of the Indians as secured by treaty, I am of the opinion that the grant should be strictly construed. . . .
>
> In other words, the statute authorizes those, at the time citizens of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that

> purpose to construct, operate, and maintain a canal. This right is in the nature of a *mere license* – authority to do an act, which without such authority would be illegal.

(emphasis added). Thus, Shields determined the rights granted in Section 10 had to be strictly construed and extended only to "citizens" of Pocatello—not to a canal company. Further, Shields determined Section 10 allowed only access, not water.

In response to Shields' opinion, Congress added a provision to the Indian Department Appropriation Act of March 3, 1891, ch. 543, 26 Stat. 989 ("1891 Act"). The provision in the 1891 Act allowed the Secretary of the Interior to grant rights of way into the Reservation for canal, ditch, and reservoir companies. It reads:

> That the Secretary of the Interior is authorized to grant rights of way into and across the Fort Hall Reservation in Idaho to canal, ditch, and reservoir companies for the purpose of enabling the citizens to thereby receive the water supply, contemplated by section ten (10) of an act to accept and ratify an agreement made with the Shoshone and Bannock Indians, and for other purposes . . . and may also attach conditions as to the supply of

> surplus water to Indians on said Fort Hall Reservation. . . .

Notably, the 1891 Act does not expand any of the rights in Section 10, nor does it refer to any of those rights as a water right. Instead, the 1891 Act uses the term "water supply." The Act simply granted the Secretary of the Interior authority to grant canal companies use of the access previously provided for in Section 10.

Nor does any subsequent historical authority give support to the City. The Tribes ceded more land for the City several years after the 1888 Act, and the border of the reservation moved more than 10 miles from the city limits. Throughout the period from 1888 to 1990, the City sought adjudication of any water rights under state law. Finally, the 1990 Fort Hall Water Rights Settlement Agreement settled water disputes between the Tribes, the State of Idaho, and the United States, but did not recognize any rights held by the City. Thus, neither the history or purpose of the 1888 Act supports the City's claim to a federal water right.

ii.

The City contends that the district court erred by failing to interpret the "in common with" language in Section 10 as granting the City a portion of the Tribes' water right. The City points to a number of cases, which it contends to be supportive of such interpretation. However, the

cases upon which the City relies deal with interpretation of Indian treaties and employ Indian canons of construction. The district court correctly declined to apply Indian canons of construction to the City's claim. Such canons are for the benefit of Indian tribes, not non-Indians.

Treaty interpretation is similar to contract interpretation. *Bonanno v. United States*, 12 Cl. Ct. 769, 771 (1987). However, unlike contract interpretation, the interpretation of a treaty, including an Indian treaty, is a question of law for a court to decide. *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 111 (N.D.N.Y. 1991) (citing *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986)). The examination of a treaty's negotiating history and purpose does not render its interpretation a matter of fact but merely serves as an aid to the legal determination which is at the heart of all treaty interpretation. *Bonanno*, 12 Cl. Ct. at 772. While we are dealing with a statute, the City contends that the treaty canons of construction apply equally here. While we do not decide that to be the case, even if it were, the canons would not favor the City.

The City argues that "in common with" language in a treaty grants a right, not merely a right of access. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*, 443 U.S. 658 (1979), the Supreme

Court determined that treaty language securing a "right of taking fish . . . in common with all citizens of the Territory" granted the Indians a share of each run of fish passing through historical tribal fishing areas. *Id.* at 679. In that case, the State of Washington and the commercial fishing associations had argued the "in common with" language merely granted the Indians a right of access. *Id.* at 675. The Court disagreed. However, the case offers no support to the City. The Court reached its conclusion after an extensive discussion of Indian tribal rights. The Court acknowledged, "It is true that the words 'in common with' may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves." *Id.* at 677. However, the Court held that it was crucial to interpret the right in the sense the Indians themselves would have interpreted it. It stated, "[t]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.* at 676 (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). The Court stressed it was crucial to consider both parties' intentions in signing the treaty. "[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties." *Fishing Vessel*, 448 U.S. at 675. Thus, the critical determination in that case

was what the Indians felt they were giving up when signing the treaty. As such, the Court found the "in common with" language in the treaty was intended to guarantee a share of the fish harvest to the Indians, not merely a right of access.

The Court's reasoning does not support the City. In *Fishing Vessel*, the Court interpreted the "in common with" language to *benefit* the Indians, especially in that the treaty in that case was a grant of rights *from* them. In this case, the district court correctly declined to apply the Indian canons of construction to the City's claim. The language that supported the fishing rights in *Fishing Vessel* was part of a treaty. A treaty is viewed as "a contract between two sovereign nations." *Fishing Vessel*, 443 U.S. at 675. A treaty with an Indian Tribe constitutes a grant of rights from them, not a grant of rights *from* the United States *to* the Indians. *Id.* at 680. Thus, the language must be interpreted as the Indians themselves interpreted it. In contrast, the language at issue in Section 10 is not embedded in a treaty—it is part of a statute. The language in Section 10 did not originate as part of a treaty—indeed, it was added several months after the negotiations for the Cession Agreement had concluded. The Tribes had no say in the development of Section 10. As discussed below, Congress will not abrogate Indian rights without clear intent and an express agreement from the Indians. Further, "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous

provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Thus, if Section 10 was ambiguous, this Court would construe it in favor of the Tribes, not the City. In sum, the City cannot claim the benefit of the Indian canons of construction, and the district court properly declined to apply them.

An additional consideration must be taken into account with regard to the City's claim, which it asserts entitles it to a share of the Tribes' reserved water right. American law treats Indian tribes differently than it does other sovereign nations or private individuals. First and foremost is the notion that agreements with Indians are to be interpreted to the benefit of the tribes. For example, the Supreme Court has stated,

> [W]e will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules."

United States v. Winans, 198 U.S. 371, 380-81 (1905) (citing *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *Jones v. Meehan*, 175 U.S. 1 (1899)). Congress certainly has the power to abrogate Indian treaty rights, but its intent to do so must be clear. *See, e.g., Minnesota v. Mille Lacs Band of Chippea Indians*, 526 U.S. 172, 202 (1999); *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (abrogation of treaty rights requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.").

The Tribes' water rights in this case are not spelled out in the Second Treaty of Fort Bridger, but the Treaty's failure to explicitly include the water right is immaterial to this question. In *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court recognized for the first time that, when the federal government withdraws land from the public domain for a federal purpose, it impliedly reserves enough water to fulfill that purpose. Thus, the Tribes in this case impliedly received the water rights necessary to sustain the purposes of their reservation with the treaty establishing the Reservation. The question is whether the Cession Agreement, ratified by the 1888 Act, abrogated any of the Tribes' rights. The answer to this question must be no.

First, in order to abrogate any treaty rights, Congressional intent must be clear. As demonstrated above, the plain language of Section 10 does not indicate an intent to grant the City a water right. Congress knew how to grant a water right in abrogation of Indian treaty rights, as demonstrated in the *Byers* case. *Byers* is particularly important in demonstrating what Congress would do in granting a water right to a non-Indian in abrogation of treaty rights because the act in question, the Pendleton Townsite Act, was enacted in 1885, three years prior to the 1888 Act. Congress knew how to do what the City wants here, but failed to do so in the 1888 Act.

Second, in order to abrogate any treaty rights held by Tribes, a majority of adult male Indians on the Reservation must consent. Thus, the vote of a majority of adult male members of the Tribes was required in order to cede any water rights. Such consent was not given. Section 10 was added several months after the Cession Agreement was negotiated. Considering that the Indians were loathe even to give up any land, it seems unlikely they would have given up any water rights had the issue been raised. The record does not reveal a single instance where the Indians were apprised of the possibility that they were to lose some water rights. Serious discussions between the federal officials and the Indians would certainly have ensued if that were the case. However, it was not. In *Byers*, the court noted that it "affirmatively

appears from the record in this case that a majority of the male adult Indians on the reservation assented in writing to the act. . ." 86 Or. at 632, 169 P. at 126. Thus, without clear Congressional intent to abrogate some of the Tribes' reserved water rights and an agreement by a majority of adult Indian males to cede some water rights, the City's argument fails.

C.

Finally, the City argues that the district court erred in that it limited Congressional authority to grant a water right under Section 10. Congress's power to grant federal water rights arises under the Property Clause. The clause states, "[C]ongress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . ." U.S. Const., art. IV, § 3, cl. 2. Merely because Congress has this power does not mean it exercised it in Section 10.

None of the parties denies Congress' power to have granted the City a water right. "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Winters*, 207 U.S. at 577 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899)). The question is whether Congress exercised that power in this case. As discussed above, Congress chose not to exercise its power here.

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D.

Because we conclude the City does not have a federal water right, we need not address other issues raised by the parties, which depended upon a favorable outcome for the City on that issue.

III.

We affirm the district court. Costs to the Respondents.

Chief Justice EISMANN, and Justices BURDICK, W. JONES, and HORTON CONCUR.

Appendix B

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls

In Re SRBA

Case No. 39576

Subcase No. 29-11609

MEMORANDUM DECISION AND ORDER ON CHALLENGE AND ORDER DISALLOWING WATER RIGHT BASED ON FEDERAL LAW

Holding: The ruling of the Special Master is Affirmed.

I.
APPEARANCES

Josephine P. Beeman, Beeman & Associates, Boise, Idaho, and Sarah A. Klahn, White and Jankowski, LLP, Denver, Colorado, appearing on behalf of the City of Pocatello.

Jeanette Wolfley, Pocatello, Idaho, appearing on behalf of the Shoshone-Bannock Tribes.

David J. Barber, Deputy Attorney General, appearing on behalf of the State of Idaho.

Peter C. Monson, U.S. Department of Justice, appearing on behalf of the United States.

II.
PROCEDURAL HISTORY

1. On April 9, 1990, the City of Pocatello ("the City") filed a claim for a federal reserved water right. On December 29, 1993, the City filed an *Amended Notice of Claim to a Water Right Acquired under Federal Law.* The federal claim filed by the City was filed as an alternative basis to thirty-eight (38) separate claims based on state law.[1] The state-law claims involved both ground and surface sources based on prior licenses, decrees and beneficial use.[2] This Challenge only addresses the federal basis for the claim.

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[1] A dual-based claim in the SRBA is treated as a single water right claim based on alternative legal theories. One theory based on state law and the other on federal law. Ultimately, only one basis for the right is decreed.

[2] The state-law based claims include surface water right claims: 29-00271 (prior decree), 29-00272 (prior decree), 29-00273 (prior decree), 29-04222 (beneficial use) and 29-07431 (beneficial use-wastewater claim). Groundwater right claims include: 29-02274 (license), 29-02338 (license), 29-02354 (license), 29-02382 (license), 29-02401 (license), 29-02499 (license), 29-04221 (license), 29-02499 (license), 29-04221(beneficial use), 29-04223 (beneficial use), 29-04224 (beneficial use), 29-04225 (beneficial use), 29-04226 (beneficial use), 29-07106 (license), 29-07118 (license), 29-07119 (license), 29-07222 (license), 29-07322 (license), 29-7375 (license) 29-07450 (license), 29-07502 (license), 29-07770 (license), 29-07782 (license), 29-11339 (beneficial use), 29-11344 (beneficial use), 29-11348 (beneficial use), 29-13558 (beneficial use), 29-13559 (beneficial use), 29-13560

2. The instant federal claim seeks a decree based on federal law with a priority of June 14, 1867, a quantity of 139.968 cfs / 5000 AFY "plus such additional quantity as shall be determined by the court to be reasonably necessary to meet the future municipal/irrigation needs of the city." The diversion works are described as 31 wells, 2 dams with headgates and various reservoirs and tank storage which duplicate those of the City's state-law based claims. Paragraph 14 of the claim states the basis of the claim to be: "Section 10 of the federal Pocatello Townsite Act, Act of September 1, 1888, Ch. 936, 25 Stat. 452, Section 10." However, paragraph 15 of the claim states that the basis of the claim was "[r]eserved," presumably referring to a federal reserved water right.

3. An abstract of the claim was prepared by the Director of the Idaho Department of Water Resources (IDWR) and filed with the Court. Objections were filed by the United States, the State of Idaho and the Shoshone-Bannock Tribes (hereinafter, "Objectors"). The City and the objecting parties all moved for summary judgment before the Special Master. The City argued that Section 10 of the Pocatello Townsite Act was an express Congressional grant of a water right to the City. Section 10 of the Act provides:

(beneficial use), 29-13561 (beneficial use), 29-13562 (beneficial use), 29-13636 (license), 29-13637 (beneficial use), 29-13638 (beneficial use) and 29-13639 (beneficial use).

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

4. The Objectors argued that the City is not entitled to a water right based upon federal law. The issue was framed as a question of whether, as a matter of law, the City is entitled to a federal water right based upon Section 10 of the Pocatello Townsite Act. The Special Master ruled that Section 10 of the Act did not grant a water right to the City. The City's motion for summary judgment was denied and the motions for summary judgment of the United States, the State of Idaho and the Shoshone-Bannock Tribes were granted. ***Order Granting United States, State of Idaho's and Shoshone-Bannock Tribes' Motions for Summary Judgment; and Order Denying City of Pocatello's Motion for Summary Judgment*** (July 28, 2005).

The Special Master also denied the City's motion to alter or amend the recommendation. This challenge followed pursuant to ***SRBA Administrative Order 1 (AO1)*** (13).

III.
ISSUES RAISED ON CHALLENGE

The central issue raised on challenge is simply stated as follows: Did the Special Master err in ruling that Section 10 of the Pocatello Townsite Act was not a grant of a federal water right to the City?

IV.
STANDARD OF REVIEW OF A SPECIAL MASTER'S CONCLUSIONS OF LAW

The Director of IDWR does not file a director's report for claims based on federal law. Only a notice containing an abstract of the elements of the claim is filed. The notice of claim and abstract does not carry the same presumptive weight as a director's report. As such, the claimant must independently establish a *prima facie* case. I.C. § 42-1411A(2). The Special Master's ruling, which is the subject of this challenge, was made pursuant to cross-motions for summary judgment. When reviewing a summary judgment order the reviewing court applies the same standard as the court below. *See e.g., Brown v. Miller*, 140 Idaho 439, 442, 95 P.3d 57, 60 (2004). The proceedings before the Special Master did not set forth any

genuine issues of material fact. The basis for the claim turns on the interpretation of a federal statute. The interpretation of a statute is a question of law. *See Certain Underwriters at Lloyds, London v. Wolleson*, 141 Idaho 740, 741-42, 118 P.3d 72, 73-74 (2005); *Nez Perce Tribe v. Little Hope Investments*, 140 Idaho 219, 222, 91 P.3d 1127, 1128-29 (2004). Additionally, where opposing parties move for summary judgment based on the same evidentiary facts, legal theories and issues, the parties effectively stipulate that there is no genuine issue of material fact. *Eastern Idaho Agricultural Credit Assoc. v. Neibur*, 130 Idaho 623, 626, 944 P.2d 1386, 1389 (1997) (citing Brown v. Perkins, 129 Idaho 189, 923 P.2d 434 (1996)). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits. *Stafford v. Klosterman*, 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000) (citing *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 721, 874 P.2d 528, 532 (1994)). When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Id.* (citing *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996); *Loomis v.*

Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991)).

Conclusions of law of a special master are expected to be persuasive but are not binding upon the district court. The district court is permitted to adopt the special master's conclusions of law only to the extent they correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Accordingly, the district court's standard of review of the trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534.

V.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on August 23, 2006. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or August 24, 2006.

VI.
DISCUSSION

1. Historical Facts

The factual background of this case is set forth in the Special Master's ***Order Granting***

United States', State of Idaho's and Shoshone-Bannock Tribes' Motions for Summary Judgment; and Order Denying City of Pocatello's Motion for Summary Judgment (July 28, 2005) and is summarized here. The relevant facts are undisputed. The Fort Hall Reservation was established by an executive order issued on June 14, 1867 by President Andrew Johnson. The Second Treaty of Fort Bridger was signed on July 3, 1868. That treaty required written consent of a majority of adult male Indians for any cessions of reservation land. In 1878 the Utah Northern Railway Company ("the Railroad") built a north-south railroad line across the reservation without obtaining permission from the Tribes or the United States. In 1881, the Railroad negotiated with the Tribes for an east-west railroad right-of-way which was approved by Congress. The rails crossed at what is now the City of Pocatello. A settlement of non-Indians soon followed and there was a significant problem with trespassing on the reservation. In October of 1885, United States Department of the Interior officials and Indian agent Peter Gallagher ordered the removal of the trespassers. In 1886, a group of citizens sent a petition asking that they not be removed because many of the trespassers were railroad employees who would lose their jobs if they were required to leave. In 1886, the Railroad asked the Secretary of the Interior to assist in negotiations with the Tribes. By 1887, the situation was becoming more

urgent. Acting Commissioner of Indian Affairs, A.B. Upshaw, informed the Secretary of the Interior that settlers had built dwellings on reservation land and that removing them might be impossible without military aid or, possibly, bloodshed.

In 1887, the Secretary of the Interior assigned Inspector Robert S. Gardner and Indian agent Peter Gallagher to conduct negotiations with the Shoshone-Bannock Indian Tribes. On May 27, 1887, formal negotiations were held. Inspector Gardner and Agent Gallagher represented the United States and a number of Shoshone and Bannock Indians represented the Tribes. The Indians said they did not want to sell their land but they were persuaded by Agent Gallagher that they should sell in order to get money to build irrigation ditches to irrigate their land. The Indians agreed and a Cession Agreement was signed by which the Pocatello Townsite was to be conveyed by the United States with the Railroad to receive a right-of-way for its existing tracks "together with necessary grounds for station and water purposes." The Cession Agreement was ratified by Congress in the Act of September 1, 1888 (the "Act") to "ratify an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right-of-way through said reservation to the Utah

and Northern Railway Company, and for other purposes." *Message from the President of the United States*, 25 Stat. 455; H.R. Exec. Doc. No. 140, 50th Cong. 1st Sess. (1888). Although the negotiations and ultimate agreement did not include a discussion of water or a right-of-access across the reservation for water section 10 of the Act nonetheless provided:

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

A transmittal letter dated February 4, 1888, from Secretary of the Interior Wm. F. Vilas to the President of the United States provided a summary of the events that led to the Cession Agreement, along with a reference to a draft of what was to become Section 10 of as follows:

> The draught of bill provides that the land ceded for the town-site (except portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town-site.

Greenwald Affidavit, p. 25, fn. 26.

Section 10 of the Act was not a part of the negotiated agreement with the Tribes.[3] It was added by Commissioner of Indian Affairs, J.D.C. Adkins, who explained in a letter to the Secretary of the Interior the following:

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[3] It appears that at least one of the Indian negotiators would have been surprised if non-Indians were allowed to go on the Reservation at all after the agreement was ratified. During the negotiations Gibson Jack insisted that stakes be placed at the Reservation boundary so that the white man should not go beyond it. The Railroad agreed to have the boundary surveyed and put up the stakes.

> Inasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its supply of water, I have deemed it advisable, as a matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the water of any river, creek, stream or spring flowing through the reservation lands in the vicinity of the town with the right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works or other aqueducts, drain and sewerage pipes, and other appliances on the reservation as may be necessary to provide with proper water and sewerage facilities.

Greenwald Affidavit, p. 20-21, fn. 84.

In 1890, the Idaho Canal Company began to build a canal from the Snake River to Pocatello. L.E. Hall, the president of the Canal Company, explained to the Commissioner of Indian Affairs in a letter dated December 26, 1890 that the citizens of Pocatello wished to contract with the canal company to construct the canal. He noted that Section 10 of the Act seemed to give the citizens a right of way for the proposed canal. He asked whether the Canal Company would be allowed to

go on the reservation to construct the canal. Greenwald Affidavit. P. 31, fn 138. On February 10, 1891, Assistant Attorney General George H. Shields responded to Mr. Hall's letter providing a legal opinion of the effect of Section 10 as follows:

> In view of the fact that the provision of said section of the statute is in derogation of the rights of the Indians as secured by treaty, I am of the opinion that the grant should be strictly construed . . . . . In other words, the statute authorizes those, at the time citizens of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that purpose to construct, operate, and maintain a canal. This right is in the nature of a mere license – authority to do an act, which without such authority would be illegal. . . . I conclude that the right so granted to said citizens is a personal one, and not assignable under present law.

Greenwald Affidavit, p. 32, fn. 139. In essence the legal opinion concluded that the provisions of section 10 were not assignable. Congress responded to the issue with the following provision to the Indian Department Appropriation Act, Act of March 31, 1891, ch. 543, 26 Stat. 989.

> That the Secretary of the Interior is authorized to grant rights of way into and across the Fort Hall Reservation in Idaho to canal, ditch, or reservoir companies for the purpose of enabling the citizens of Pocatello to thereby receive the water supply, contemplated by section ten (10) of an act to accept an ratify an agreement made with the Shoshone and Bannock Indians, and for other purposes, . . . and may also attach conditions as to the supply of surplus water to Indians on said Fort Hall Reservation.

Greenwald Affidavit, p. 31-32; State of Idaho's Exhibit 8.

Thereafter F.D. Toms and J.J. Cusick, owners of the Pocatello Water Company, began appropriating water from several sources in accordance with Idaho's then-existing posted notice method of appropriation. The posted notices provided, in part,

> We the undersigned, citizens of Pocatello, Idaho by an act of Fiftieth Congress setting Aside the Townsite of Pocatello, in the Fort Hall Indian Reservation, Idaho and the laws of the State of Idaho, hereby locate and claim Five Thousand (5000) Miners inches of the waters of this stream

> known as Mink Creek, . . . to be taken from this stream to be used for domestic, manufacturing and Irrigating purposes in the Town of Pocatello, Idaho.

State of Idaho's Exhibit 14. Similar other appropriations were subsequently made in the same manner. State of Idaho's Exhibit 15 ("Birch Creek"); State of Idaho's Exhibit 16 ("Tom Doctor Creek").

2. The federal basis for the City's claim would not be co-extensive with the scope of alternative claims based on state law.

Prior to determining whether or not the Pocatello Townsite Act actually granted a federal water right to the City there are some preliminary issues that need to be reconciled from the outset with the labyrinth of established law-of-the-case in the SRBA. These issues pertain to whether the scope of the Act even applies to the groundwater sources which constitute the overwhelming majority of the City's claim; whether the City is already bound by the prior decrees and/or licenses previously issued for most of its surface water right claims; and whether even if the federal government conveyed a water right to a non-federal entity, would the right take on the character of a "federal right" or would the right simply be subject to state law. In other words, would the right be treated like

a federal reserved water right for purposes of quantification, forfeiture, abandonment, future needs, and possible differences in administration. The Court views these issues as preliminary to the merits because even if the Court were to accept the City's interpretation of section 10, the portion of the federal claim on which the City could proceed would be so substantially smaller in scope than the alternative state-law basis for its claims that the City would have very little to gain by proceeding under federal law.

A. The nature of the City's claim.

The City's claim was originally filed as a single federal reserved water right as an alternative legal theory to the thirty-eight (38) individual state-law based claims. The City has since conceded that no reservation of land occurred for purposes of establishing a federal reserved water right and has made it clear to this Court that it is not seeking a federal reserved water right. Rather, the City has amended its legal theory and argues that the Pocatello Townsite Act constituted an express grant of a water right from the federal government to the City. The City argues that the Property Clause of the United States Constitution authorizes the federal government in its proprietary capacity to convey a water right with or without a reservation of land. Article IV section 3 of the United States Constitution provides, "Congress shall have the Power to dispose of and make all

needful Rules and Regulations respecting the territory or other property belonging to the United States." U.S. Const., Art IV. § 3, cl.2. The City cites two examples where in the past Congress has expressly granted a water right without a reservation of land. However, because none of the parties to this subcase dispute the fact that Congress would have had the authority under the Property Clause to convey a water right to the City had it intended to do so, the Court need not address the issue. The issue is more appropriately focused on whether Congress exercised that authority. The City argues the Special Master misconstrued the operative phrase "free and undisturbed use in common with said Indians of the waters" and that by applying general rules of statutory construction the phrase demonstrates Congressional intent to convey a water right.

B. Section 10 of The Pocatello Townsite Act only expressly pertained to surface water sources.

Section 10 expressly and unambiguously applied to "the waters of any river, creek, stream, or spring flowing through Fort Hall Reservation in the vicinity of said town. . . ." Of the City's thirty-eight (38) state-law based claims for which the City filed an alternative claim based on federal law only five of those claims are to surface sources. The remainder are groundwater claims. A similar issue was previously addressed by the SRBA Court

(Judge Roger Burdick) in the context of an issue regarding the scope of a federal reserved right created by Executive Order Public Water Reserve (PWR) 107. *See* ***Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman,*** Consolidated Subcases 23-10872 *et al.*, Joint Submission Subcases 23-10894 *et al.* (Dec. 28, 2001). In that case, the executive order expressly applied to lands surrounding "springs" or "waterholes." Following a remand from the Idaho Supreme Court, which determined that PWR 107 created a federal reserved water right in order to prevent the monopolization of scarce stockwatering sources on public grazing lands, an issue was raised questioning the various types of "springs" or "waterholes" that were contemplated by PWR 107. Although the executive order did not expressly define the terms, the SRBA Court found the terms to be unambiguous by giving the terms their plain, common and well established meanings.

> In *Hagerman Water Right Owners*, the Idaho Supreme Court stated that '[i]f statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction.' *Id.* at 732, 947 P.2d at 405 (citations omitted). 'Statutory interpretation begins with the words of the statute, giving the language its plain, obvious, and

> rational meanings.' *Id.* (citations omitted). In this case the Court does not find PWR 107 to be ambiguous when applying the plain, common and established meanings of its express terms.

Memorandum Decision and Order on Challenge at 25-27 (quoting *State v. Hagerman Water Right Owners Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997).

Similarly, in defining the sources identified within the Pocatello Townsite Act the express terms "river, creek, stream, or spring" are equally unambiguous. In line with the Court's reasoning with respect to PWR 107, this Court concludes that the Pocatello Townsite Act does not include groundwater sources.

It is important to distinguish the instant claim from an implied federal reserved water right which can extend to groundwater. *See e.g. United States v. Cappaert*, 426 U.S. 128, 142-43 (1976) (implied-reservation-of-water-doctrine based on necessity of water for purposes of federal reservation). In that case, the legislation withdrawing land from the public domain is typically silent as to water rights. The inquiry is whether the primary purpose of the reservation would fail without an implied concomitant reservation of appurtenant water. The source of the

water can be from surface or groundwater. *Id.* at 139. Because the City of Pocatello is claiming an express grant of a water right as opposed to an implied federal reserved water right this same reasoning and implication does not apply. Any alleged conveyance would be strictly limited to the surface sources as expressly provided for in the Act.

C. The City is bound by the prior decrees and state licenses previously issued for its surface right claims.

The City of Pocatello filed "dual-based" claims to the same water, meaning the claims were filed under the alternative legal theories, one based on federal law and the other on state law. In Basin-Wide Issue 12, the SRBA court ruled that a single water right cannot be decreed with both a state and a federal basis. ***Special Master's Second Amended Recommendation Re: Basin-Wide Issue 12. Memorandum Decision and Order Re: Basin-wide Issue 12***, subcase 91-00012 (April 25, 1997) (affirming ruling of special master). This ruling has been consistently applied in the SRBA and primarily arose in the context of federal stockwater rights claimed under both state and federal law.

The effect of Basin-Wide Issue 12 is that federal and state law based claims to the same water, by the same claimant, for the same purpose of use are considered a single water right based on alternative legal theories. The claimant, (typically the United States), is not entitled to two separate

water rights for the exact same purpose of use, even though one is alleged to be established under state law and the other pursuant to federal law. In the context of a water right based on state-law the issue of whether claimant can be decreed two identical water rights would not arise because only one right can be beneficially used at a time and as a result the other claim would be subject to issues of forfeiture or abandonment for non-use. However, the same reasoning would not be true for a federal reserved right which can lay dormant until adjudicated and is not subject to forfeiture for non-use. Hypothetically, the United States could establish a beneficial use right pursuant to state-law and also maintain an identical federal reserved water right for the same use even though the right has never been used. Basin-Wide 12 eliminated the issue by determining that ultimately the claimant is only entitled to a single right.

In this case, of the five surface water claims filed by the City of Pocatello, water right claims 29-00271, 29-00272 and 29-00273 have already been adjudicated with a state-law basis. Although copies of the prior decree(s) are not included in the record, the Director's recommendations state that the claims are based on prior decrees. Water right claim 29-07431 is a licensed wastewater claim to re-use water already diverted by the City. Although decrees issued in a prior adjudication are not conclusive as to the proof of existence of a water right, prior decrees are binding on the parties to

the decree and their privies. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741-42, 947 P.2d 409, 414-15 (1997). A prior decree is not considered "conclusive" because it cannot insulate the water right from re-examination of subsequent use. *Id.* In the instant case, the state-law basis for the water use has already been decreed. Accordingly, the City is bound by those prior decrees.

Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.

> The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.* Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a

> license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higgenson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844 693 P.2d 1046 (1984).

Id. (quoting ***Supplemental Findings of Fact and Conclusions of Law*** (Facility Volume) (July 31, 1998); *see also* ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge***, subcase 36-08099 (Jan 11, 2000) upholding subordination remark contained in a license for hydropower water right claim).

Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative

proceeding and their privies.[4] The Idaho legislature also acknowledged the binding effect of prior licenses and decrees in enacting Idaho Code § 42-1427 which provides a mechanism for defining elements of water rights not described in prior decrees or licenses. Accordingly, the City is also bound by its prior license for water right claim 29-07431.[5]

The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding. The City argued that there was no prior McCarran Adjudication for

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[4] Publication notice is given and any affected person can initiate a contested case. With respect to prior decrees, not all water users hydraulically connected to the source were always joined as parties.

[5] As to the previously-licensed or decreed right the Special Master relied on a previous SRBA decision involving Mtn. Home Air Force Base also issued by Judge Burdick. In ***Order Disallowing Uncontested Federal Reserved Water Right Claims*** (Mountain Home Air Force Base, subcases 61-11783, 61-11784, and 61-11785 (April 6, 2001)), following a *prima facie* hearing for federal uncontested claims, the SRBA Court denied the United States' claims for federal reserved water rights based on acquired or condemned land. Although the case was decided on that particular issue, the Court also raised the issue of whether the United States was barred from claiming federal reserved rights where the subject rights had been previously licensed. The Court's reasoning with respect to that issue was sound and the Special Master's reliance on that reasoning was not err.

litigating its federal law claim. While this may be true, the argument fails in two respects. First, it is through the McCarran Amendment that the United States and Tribes consent to be joined as defendants in any suit for the adjudication of the rights to the use of water of a river system or other source. *See Higginson v. United States et al.*, 115 Idaho 1, 4 (1988). As such, absent a McCarran Adjudication the United States and Tribes have historically avoided having their rights adjudicated in state courts. However, to the extent the tribes or United States previously submitted to the jurisdiction of the state and had their rights adjudicated or licensed, they are nonetheless bound by those decrees or licenses. Nothing prevented the City from avoiding having its water uses previously licensed. As to its decreed rights, the City could have pursued its federal statutory grant theory in those proceedings or at least preserved the issue for later resolution. In conjunction with the prior proceedings, the City could have also identified and preserved the issue of a federal basis for a later time similar to the manner in which the City preserved the issue in connection with the *Fort Hall Water Users Agreement* settlement.[6] Second, the City of Pocatello is neither a federal nor tribal

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[6] In anticipation of the SRBA the United States also preserved the issue of federal reserved water rights for forest service claims in conjunction with the Lemhi Adjudication, which was a McCarran Adjudication completed after the commencement of the SRBA.

entity. To the extent the City argues that its claim is simply an express grant of a water right from the federal government and not a federal reserved water right, a state court would not necessarily have to join the United States or Shoshone-Bannock Tribes as parties in order to have previously asserted its claim. An analogy would be a quiet title action where a landowner traces a chain-of-title back to the land patent from the federal government. In this case, there is a statute allegedly evidencing a grant instead of an instrument of conveyance or patent. Admittedly, any resulting decree would not be binding on the United States or Tribe; however, the same is true with all non-McCarran Adjudications and the State of Idaho has had numerous such adjudications prior to the commencement of the SRBA.

D. Even if the federal government granted a water right to a non-federal or non-tribal entity the water right would not have the same characteristics as a "federal right" including immunity from state regulations.

Another issue with respect to previously decreed or licensed water rights is the principle that once the water right has been either decreed or licensed, it becomes conclusive that the continued use of the water right is being conducted pursuant to the license or prior decree not some alternative basis for the right. The City's alternative federal basis for the rights has never been put to beneficial

use. The City has always used its licensed or decreed rights for all except one of its surface claims. Water right claim 29-04222 is the only right which has not been previously decreed or licensed.

Federal reserved water rights vest as of the date of the withdrawal of land and are not subject to forfeiture or abandonment for non-use. *See e.g. United States v. Orr Water Ditch Co.*, 309 F.Supp.2d 1245 (2004). The basis, measure and limit of the right is not beneficial use but rather the creation and purpose of the reservation of land. *Id.* at 1251. As a result, the fedral [sic] reserved water right can sit dormant for years until claimed and decreed in a general adjudication. In this case, even if a water right was expressly conveyed to the City by Congress, the right would not necessarily be endowed or cloaked with all of the same attributes and immunities associated with a federal reserved water right. Stated differently, if a right had been conveyed by Congress that would not *per se* make the right a "federal right" for purposes of immunity from state-law.

For example, land patents from the federal government to non-federal or non-tribal entities do not render the lands conveyed immune from state regulation and administration. In the context of water rights the nearest example the Court can identify is the case of a *Walton* right where a portion of a federal reserved water right is conveyed from a federal or tribal enclave to a non-

federal entity. *Colville Confederated Tribes v. Walton*, 647 P.2d 42 (9th Cir.1981). In the case of a *Walton* right, the water right originally began as a federal reserved water right based on a withdrawal of land for an Indian reservation. Following the General Allotment or Dawes Act, reservation lands were allotted and conveyed to individual tribal members. The allotment carried with it as an appurtenance a portion of the federal reserved water right. As long as the tribal member held onto the allotted land and its appurtenant water, the right held its trust status and maintained the characteristics of a federal water right to the extent the right was not lost if it was not put to beneficial use. However, once the land and appurtenant water passed out of trust status to a non-tribal member, the water right essentially became a state-law based water right with a date-of-reservation priority date. Following acquisition by the non-Indian, the water right essentially became subject to state rules regarding beneficial use, notwithstanding the fact the right may have never been previously adjudicated. Although the exact nature of the resulting right has never been specifically defined, the Ninth Circuit was abundantly clear that the non-Indian successor had to put the right to beneficial use within a reasonable time or the right was lost. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the Ninth Circuit summed it up best by stating, "[t]he second restriction may be simply expressed

as: **use it or lose it.**" *Id.* at 1362 (citing *Walton* at 51)(emphasis added).

The same reasoning would appear to be equally true if the federal government conveyed a water right to a non-federal entity for a non-federal purpose. In harmonizing the nature of the alleged right with existing law, the water right would be more akin to a state-law based right with a date of conveyance priority. In *United States v. Rio Grande Dam & Irr.*, 174 U.S. 690 (1899), the Supreme Court held that the federal government acquiesced to state water law subject to two exceptions. The first being the navigation power and the other exception being that a state, by its legislation, cannot destroy the right of the United States as owner of land bordering a stream to the continued flow of its waters for at least as may be necessary for the beneficial use of the government property. *Id.* at 703. In 1908, in *Winters v. United States*, 207 U.S. 564 (1908), based on the second exception enunciated in *Rio Grande Dam*, the Supreme Court ruled that when the federal government withdraws a part of the public domain for a particular purpose, it reserves sufficient unappropriated water to effectuate that purpose. Subsequent Supreme Court decisions have defined the nature and scope of the federal reserved water right. *See e.g. United States. v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976). An express federal grant of a water right without a reservation of land to a non-federal entity

for a non-federal purpose is not one of the enunciated exceptions. As such, consistent with this historical deference, even if Congress did exercise its authority under the Property Clause by conveying such a water right, there exists no legal authority suggesting that the nature and scope of the right conveyed would preempt state laws on beneficial use. Other than the established laws governing federal reserved water rights, which have developed throughout the twentieth century, there is no separate body of federal law which governs a water right granted by the federal government that is alleged to be immune from state regulation.

The City cites to two cases where it argues Congress expressly conveyed a water right without a contemporaneous withdrawal of land. However, both examples have no bearing on the instant claim for purposes of defining the nature and scope of the City's alleged federal water right claim. The first case addresses a federal acquisition of water right, including an instream water right, for the expansion of the Great Sand Dunes National Monument in Colorado into a national park. *Great Sands Dune National Park and Preserve Act of 2000*, Pub.L. No. 106-530, 114 Stat. 2527, 16 U.S.C.A. § 410hhh *et seq.* The case is distinguishable from the instant matter. First, the water right was decreed and maintained in the name of the federal government as opposed to being passed to a non-federal entity. Second, the

legislation defining the scope and nature of the right was the result of a negotiation between the congressional delegation and local interests within the state of Colorado. The federal government initially wanted to proceed with a federal reserved water right through the withdrawal of an expanded conservation area for a national park. The agreement and resulting legislation required that the federal government appropriate the right through state law processes in accordance with the priority system but that the right would be defined and quantified according to federal law and held in the name of the National Park Service. The resulting right has been described by commentators as a hybrid of federal and state law or a "non-reserved" right. *For complete discussion see* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. Denv. Water L. Rev. 271 (2001) (lecture by former solicitor on history of Sand Dunes legislation). The nature and scope of the resulting water right was a product of a negotiation as opposed to the act of a sovereign attempting to define a rule of action by legislative fiat.

The second example involves a congressional confirmation of a water right to a non-Indian on the Umatilla Indian Reservation. In *Byers v. Wa-Wa-Ne et al.*, 169 P.2d 121 (1917), at issue was a dispute between the United States acting on behalf of the Umatilla Indians and a non-Indian successor-in-interest to a water right claim which

competed with tribal claims and was conveyed via a ditch running across the reservation. The reservation was established by a treaty in 1855. Oregon was admitted to the Union in 1859. In 1870, the Commissioner of Indian affairs granted a revocable license to a non-tribal member to construct a ditch across a portion of the reservation to convey water for the operation of a mill. Water for the mill was diverted continuously from 1874 until the issue was decided by the Oregon Supreme Court in 1917. In 1885, the reservation was allotted. An amendment to the federal legislation allotting the reservation expressly confirmed a water right to the successor-in-interest to the mill. The Oregon Supreme Court held that the United States had confirmed a right to the operator of the mill. The basis for the Court's decision was that the treaty did not reserve to the Indians all of the water within the boundaries of the reservation nor did the *Winters Doctrine* stand for the proposition that all of the waters within the boundaries of a reservation were impliedly reserved. *Id.* at 634-36. The Court also held that if the treaty had in fact reserved all of the water within the boundaries of the reservation that Congress also had the power to extinguish those rights. *Id.* at 631. The case is not particularly instructive on the nature and scope of the right ultimately confirmed. The decision does not stand for the proposition that the water right, albeit confirmed by Congress, was endowed with all of the principles which are now associated with the

concept of a federal reserved water right. In fact, one of the factors the Court discussed was that the right had been continuously used since its inception. That concept is not germane to the establishment of a federal reserved right.

At least as to those rights which have been previously licensed or decreed the City has never beneficially used the federal basis for the claim since it was allegedly granted in 1888.

E. Conclusions regarding the limitations on the City's federal law basis for its claim.

In summary, if it is established that the Pocatello Townsite Act constituted a grant of a water right, that right only applied to surface sources. Of the five surface rights claimed by the City, only water right 29-04222 has not been previously licensed or decreed in accordance with state law. The City is bound by those prior licenses and decrees as to those portions of its federal claim. The state-law basis for water right claim 29-04222 is a beneficial use claim from Gibson Jack Creek for 5.00 cfs with a June 16, 1898, priority. As to the argument that there is some separate yet to be identified portion of the federal right that has been lying dormant for 100 years in anticipation of a future McCarran Adjudication, similar to a circumstance involving a federal reserved right, for the reasons just discussed above, that argument is without merit. At best, the City's dual-basis theory can only proceed with respect to 29-04222. With

that limitation in mind, the Court next addresses the issue of whether the Pocatello Townsite Act established a grant of a water right from the federal government to the City of Pocatello.

3. The Special Master did not err in concluding that the Pocatello Townsite Act only established a right of access for appropriating water.

A. Applicable rules of statutory construction.

In turning to the argument that section 10 of the Pocatello Townsite Act created an express grant of a water right from the federal government to the citizens of the City, section 10 provides in its entirety:

1. "That the citizens of the town hereinbefore provided"

2. "shall have the free and undisturbed use in common"

3. "with said Indians"

4. "of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town,"

5. "with right of access at all times thereto, and the right to construct operate, and maintain such pipe ditches, canals, works, or other aqueducts, drain and sewerage pies, and other

appliances on the reservation, as may be necessary to provide said town with proper water an sewerage facilities."

In ***Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights)*** the SRBA Court previously addressed the principles of statutory construction with respect to a federal statute in the context of a federal reserved claim and applied the same to an executive order which expressly addressed water.

In *Hagerman Water Right Owners*, the Idaho Supreme Court stated that, '[i]f statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction." *Id.* at 732, 947 P.2d at 405 (citations omitted). "Statutory interpretation begins with the words of the statute, giving the language its plain, obvious, and rational meanings." *Id.* (citations omitted). However, '[i]f it is necessary for the Court to construe a statute [or executive order], then it will attempt to ascertain the legislative [or executive] intent. In construing a statute, this Court may examine the language used, the reasonableness of the proposed interpretation, and the policy behind the statute." *Id.* at 733, 947 P.2d at 406 (citations omitted).

In regards to the role of administrative agency interpretations and historical applications with respect to interpreting a statute or executive order, the Idaho Supreme Court stated "[a] basic

rule of statutory construction is that the application of a statute is an aid to construction where the public relies on the application over a long period of time. *Id.* (citing SUTHERLAND STAT. CONST. (5th ed.1992). Further,

> [s]tatues are documents having practical effects. It is therefore improper to construe them in the abstract, without taking into consideration the historical framework in which they exist. . . . Correlatively, such information is also relevant when deciding what the statute means to others because it is important to know how people affected by an act understand it.

Id. (quoting SUTHERLAND at § 49.01).

> Where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as very important in arriving at the proper construction of a statute. [O]ne of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that the public has relied on the interpretation.

Id. (quoting SUTHERLAND at § 49.07). The Idaho Supreme Court summarized the four-part test for

establishing when agency construction should be accorded deference as follows:

> This four prong test states that an agency's construction will be given great weight if: (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statue is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.

Id. (*citing Garner v. Horkley Oil*, 123 Idaho 831, 833, 853 P.2d 576, 578 (1993) (*citing J.R. Simplot Co. v. Idaho State tax Commission*, 120 Idaho at 862, 820 P.2d at 1219.))

Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights) at 11-12.[7] The United States Supreme Court has also established under federal law when the interpretation of an administrative agency charged with administering the statute in question is to be given great weight.

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[7] Although federal law applies in the context of a federal reserved right, principles of statutory construction are similar and the Idaho Supreme Court has relied on the *Hagerman Water Right Owners* in construing federal legislation in the context of a federal reserved water right. *See e.g. State v. United States*, 134 Idaho 940, 944, 12 P.3d 1284, 1288 (2000) (Sawtooth National Recreation Area).

> 'We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference.' ... 'To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' ... We need only conclude that it is a reasonable interpretation of the relevant provisions.'

Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380 (1984)(citing *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 422423, 103 S. Ct. 1921, 1933, 76 L.Ed.2d 22 (1983), quoting *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946)).

B. Section 10 is not ambiguous when read in conjunction with the historical context in which the language was used.

The City's argument relies essentially on its interpretation of the operative phrase "shall have the free and undisturbed use in common with the said Indians of the waters. . . ." In applying the plain meaning of the statutory language the Court

cannot conclude that the phrase "shall have the free and undisturbed use in common with said Indians of the waters . . ." constituted and express intent by Congress to establish a water right. Nor does the Court find the language to be ambiguous when read in conjunction with the historical context in which the language was used. However, prior to applying the plain meaning of the terms it is necessary to discuss the proper context in which the terms were used and explain why the language was not intended to establish a water right.

C. Section 10 does not contain common terms evidencing the transfer of a property interest.

On its face section 10 does not refer to a "water right" nor does it contain historically recognized and accepted terms of conveyance such as "grant" "bargain" "sell" or "convey" evidencing a transfer in a property interest. In contrast, in the *Byers* case relied on by the City where the Court upheld an express congressional confirmation of a water right in conjunction with the allotment of a reservation, Congress used a term evidencing a conveyance of property. Although, as previously discussed, the Court did not define the nature of the right, significant to the ruling was the choice of the express language used in the statute. "The salient language in the act is: 'That the *water right* . . . be *confirmed*.'" *Byers* at 629-31. The Court applied the accepted legal meaning of the term

"confirm." "A confirmation is a conveyance of an estate or right in lands to one who has the possession of some estate therein." *Id.* at 630. The meaning of the language was unequivocal.

In the instant case, the congressional choice of words was not as unequivocal. Although section 10 did not contain legal terms of conveyance another portion of the Pocatello Townsite Act did. Section 11 of the Act, immediately following section 10 provided: "That there be, and is hereby, **granted** to the said Utah and Northern Railway Company a right of way." (emphasis added). The remainder of section 11 went on to define with particularity the nature and conditions of the right-of-way granted. Consequently, had Congress intended to expressly grant a water right to the City, it would have used the more exacting language.

D. The City may not rely on interpretations of substantially similar language which have resulted in the confirmation of treaty reserved rights.

Instead of using legal terms evidencing a conveyance section 10 used the phrase "free and undisturbed use in common with Indians." As argued by the City, this or substantially similar language has been held to confirm tribal rights such as hunting, fishing and even water. However, reliance on the interpretations offered in these lines of cases is misplaced. The language originated in the context of treaty interpretations in support of

treaty reserved water rights or "*Winans*" rights as opposed to a federal reserved or "*Winters*" right.[8] The critical distinction is twofold. First, what is at issue in these lines of cases is not the plain meaning of the language but rather what would have been understood and agreed upon by the Indian Tribe during the treaty negotiations with the United States. Second, different canons of interpretation apply when interpreting treaty language as opposed to statutory language. In the case involving the Nez Perce Tribes' instream flow claims, Judge Wood, then presiding Judge of the SRBA, summarized these canons of interpretation.

> In contrast to an implied federal reserved water right, an Indian reserved water right is the recognition by the federal government of an aboriginal right (i.e. hunting or fishing) either reserved by the Indians or not expressly ceded by the Indians through a respective treaty or other agreement. The existence of the right rests on the interpretation of the treaty so as to ascertain the intent of the parties. Interpretation of the treaty is governed by the application

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[8] *United States v. Winans*, 198 U.S. 371, 373, 25 S.Ct. 662, 664 (1905)(recognizing concept of treaty reserved right); *Winters v. United States*, 207 U.S. 564 (1908)(establishing federal reserved water right).

of various established canons or principles of Indian treaty interpretation. The foremost principle being the recognition that the Indian Tribe and the United States are independent sovereigns and that a treaty with an Indian Tribe constitutes a grant of rights to the United States from the Indians, not a grant of rights from the United States to the Indians. Thus any rights not expressly granted in the treaty by the Indians are reserved to the Indians. *United States v. Winans*, 198 U.S. 371, 373, 25 S.Ct. 662, 664 (1905); *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1984); *State v. McConville*, 65 Idaho 46, 50 (1943). Any rights reserved to the Indians can only be terminated by acts of Congress. *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789, 798 (1998) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Another canon is that Indian treaties must be interpreted as the Indians themselves would have understood them. This canon results from the disparity between the parties with respect to understanding the English

language. *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S. Ct. 3055, 3069, 61 L.Ed. 2d 823 (1979). Any ambiguities must be resolved in favor of the Indians. *Id.* at 675-76, 99 S. Ct. at 3069-70. Treaties are construed more liberally than private agreements and to ascertain their meaning courts may look beyond the writing itself to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *United States v. Washington*, 135 F.2d 618, 630 (9th Cir. 1998) (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991)). Indian rights have been "confirmed" through treaty interpretation based on the application of the foregoing canons. *See Winans, supra,* at 373, 25 S.Ct. at 664 (reserved right of access to fishing grounds); U*nited States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (reserved on-reservation water right for fishing); *McConville, supra* at 50 (recognizing reserved right to fish); *Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754 (Mont. 1985) (distinguishing between federal and Indian reserved water rights).

> Unlike an implied federal reserved right, the priority date of an Indian reserved water right is predicated on the historical use by the respective Tribe and can relate back to "time immemorial." *Adair*, *supra* at 1414.

Judgment Granting Motions for Summary Judgment (Nez Perce Consolidated Subcase 03-10022) (Nov. 10, 1999) at 24-25.

Washington State Passenger Fishing Vessel v. United States, 443 U.S. 658 (1979) involved the interpretation of the Stevens' treaty language, "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the territory*. . . ." (emphasis added). The issue was whether the subject treaty language created a right of access to take fish or whether the language guaranteed a greater right to a share of the harvest of the fish. *Id.* at 675. In finding that the language created a right to a share of the fish as opposed to merely a right of access, the Supreme Court interpreted the treaty as to how the Indians would have understood the language during the treaty negotiations. *Id.* at 677-78.

The "use in common" language or similar variations of the language appeared in a number of western treaties. Although the interpretation of the intended meaning of the use of the term must

necessarily be determined on a case-by-case basis in the context of the individual treaty negotiations the underlying arguments and ultimate resolution of the issue shared a common theme. Speaking in very general terms, from the perspective of the United States, the inclusion of the "use in common" language or variations thereof which appeared in various treaties and in all likelihood was intended to reserve to the Indians rights outside the boundaries of the reservation no greater interest than those held by the public in general. However, from the Indians' perspective it was intended that the "use in common" would permit them to continue with their aboriginal practices outside boundaries of the reservation. Neither the Indians nor the United States contemplated that the use described in the Treaty would be jeopardized by future growth, depletion of resources and regulations.[9]

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[9] To illustrate this point, in *Passenger Fishing Vessel*, the Supreme Court stated:

> At the time the treaties were executed there was a great abundance of fish and a relatively scarcity of people. No one had any doubt about that the Indians' capacity to take as many fish as they might need. Their right to take fish could be therefore be adequately protected by guaranteeing them access to usual and accustomed fishing sites which could be and which for decades after the treaties were signed.
>
> ...
>
> [I]t is fair to conclude that when the treaties were negotiated, neither party realized or

Hence, under the established canons of treaty interpretation, in order to give full effect to the intended purpose of the treaty reservation based on how the Indians would have understood the reservation, the Courts have held that the "use in common" language establishes a "right" as opposed to a mere "use in common" or license. The finding of a "right" upholds the terms of the treaty as understood by the Indians not necessarily the intent of the United States.[10]

> intended that their agreement would determine whether, an if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

Passenger Fishing Vessel at 675-76.

[10] Again, to illustrate this point, in *Passenger Fishing Vessel,* the Supreme Court stated:

> It has been held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in a sense they would naturally be understood by Indians.'
>
> It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have

The City may not claim the benefit of those canons of interpretation. In the instant case, at issue is the meaning of statutory language which did not originate in a treaty. The executive order and subsequent Treaty of Fort Bridger, which established the Fort Hall Indian Reservation, did not expressly address water rights. The issue of water was also never addressed or negotiated with the Shoshone-Bannock Tribes in conjunction with the cession of a portion of the reservation for the townsite. As such, the City may not rely on prior interpretations of language similar to the subject language which have involved treaties and the application of canons of treaty interpretation.

E. Section 10 does not expressly refer to any of the other traditional elements necessary to define a water right.

> the same right as individual non-Indians or as securing an interest in the fish runs themselves. If we were to construe these words by reference to 19th-century property concepts, we might accept the former interpretation, although even 'learned' lawyers of the day would probably have offered differing interpretations of the three words. **But we think greater importance should be given to the Indians' likely understanding of the other words in the treaties.**

Passenger Fishing Vessel at 675-76.

Aside from not referring to a "water right," section 10 is also silent as to any of the elements which would necessarily define a water right such as rate of diversion, quantity, place of use, etc. The Special Master bifurcated the proceedings between "entitlement" and "quantity." This approach is a routine practice with respect to a federal reserved water right based on the nature and legal principles governing a federal reserved water right. In the context of a federal reserved water right the water right is implied as the legislation withdrawing land from the public domain is typically silent as to water. The Court must as a matter of law imply congressional intent by determining whether the primary purpose of the legislation would be defeated without a reservation of water. If the primary purpose would be defeated then the Court must factually determine the minimum amount necessary to fulfill the primary purpose of the reservation. The nature and order of the issues pertaining to a federal reserved water right lends itself to a bifurcated proceeding.

Such is not the case with respect to a water right alleged to have been expressly granted. Because the claim is based on an alleged express grant the Court must look at the face of the statutory language to glean the elements. The Court may not rely on the same process and principles used to quantify and define a federal reserved water right. From this Court's perspective, the absence of any express elements describing the

nature and scope of the water right is relevant in implying congressional intent. In other words it is inappropriate to consider whether or not Congress intended to convey a water right without considering in the same analysis the nature and scope of the right alleged to have been granted. Based on the absence of any defining factors in section 10 there would be no means or standards by which the Court could quantify or otherwise define the right alleged to be granted. On its face the implication would be that the right allegedly conveyed was immune from state law, regulation and administration and that section 10 essentially granted the City of Pocatello an open ended water right to the use of the water in whatever quantities, present and future, deemed necessary. This would indeed be some sort of "super" water right immune from state law and by default be free from federal regulation because of the absence of any applicable regulations governing the scope of express grants. This interpretation would lead to an absurd result. In sum, the absence of any elements defining the nature and scope of the alleged right is probative that Congress did not intend to establish such a federal water right.

F. Section 10 also could not have established that the City was entitled to a portion of the Tribes' water right.

One of the arguments raised is that section 10 granted to the City a portion of the Shoshone-

Bannock Tribes water right. This Court disagrees. As discussed previously the executive order and subsequent Fort Bridger Treaty which established the Fort Hall Reservation in 1867 was silent as to water rights. The Tribes acknowledge that water rights were not discussed in the treaty negotiations and have never claimed rights based on a treaty reservation. Accordingly, Congress could not have intended that the City share in a portion of a treaty reserved right held by the Tribe because water rights were never addressed, negotiated or established in connection with the Fort Hall Reservation. Simply stated, the Tribes' did not have a water right based on a treaty.

The basis for the Tribes' water rights is a federal reserved or a *Winters* right based on the federal withdrawal of lands for the reservation. In 1888 when the Pocatello Townsite Act was passed, the Tribes did not yet have a water right for the City to share in common. Rather the Tribes had the ability or license to use the unregulated available water the same as any other citizen. The unregulated ability to use water is not the same as possessing a water right. It would not be until the *Winters* decision in 1908 that the Tribes would have a colorable claim based on a federal reserved water right relating back to the date of the reservation. **However, in 1888, Congress could not have intended that the City share in a portion of the Tribes' federal reserved water right because the concept of a federal reserved water right did not yet**

exist and would not exist for another twenty years. Therefore, it would be error for this Court to impute that Congress intended by section 10 that the City share in a portion of the Tribes' federal reserved water right.

One of the arguments made by the objectors was that the elements for establishing whether a portion of a tribal (water) right had been ceded have not been established. *See South Dakota v. Yankton Sioux Tribe et al.*, 118 S.Ct. 789 (1998)(establishing test for abrogation of treaty right); *United States v. Dion*, 476 U.S. 734 (1986). Based on the foregoing reasoning the Court need not reach this issue. Based on the attendant circumstances, Congress could have only been operating under the assumption that the Tribes' did not have an established water right.

G. The grant of an express water right is inconsistent with the historical deference Congress has accorded water allocation.

It is well established in western water law that the federal government historically deferred to state law for the appropriation of water. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). The federal government did not create a separate body of water law; rather it relied upon the laws of western states to govern the allocation and administration of water. Prior to the federal government regulating the public domain and state laws governing water the use of

public land and available water was as a practical matter open to the public in general. This open use has sometimes been referred to as an "implied license."[11] Subsequently all of the federal legislation aimed at settling and reclaiming the west either implicitly or expressly relied upon state law for the allocation of water. *See e.g. The Mining Act of 1866*, Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C.A. § 51 (1986)); *The Act of 1870*, Act of July 9, 1870, ch 235, § 17, 16 Stat. 217, 218 (codified at 30 U.S.C.A. § 52 (1986)); *The Desert Land Act of 1877*, Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified at 43 U.S.C.A. § 321 (1986)); *The Taylor Grazing Act*, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986); The Reclamation Act of 1902, Act of June 17, 1902, ch.1093, 32 Stat. 388 (codified as 43 U.S.C.A. 370 *et seq.*)).

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[11] *Buford v. Houtz*, 133 U.S. 320, 326-27(western public lands were an open grazing commons used by all who wished for rearing livestock); *Public Lands Council v. Babbit*, 529 U.S. 728, 731-733 (2000) (ranchers once freely grazed on publicly owned land as herds moved from place to place searching for grass and water); *Wilkinson Livestock Co. v. McIlquam*, 83 P. 364, 369 (Wyo. 1905) ("This privilege or right of pasturage upon the public lands of the government, which are left open and unenclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons.")

In *California v. United States*, 438 U.S. 645 (1978), the United States Supreme Court summarized the relationship between the state and federal government as concerns the allocation of water, as follows:

> In *United States v. Rio Grande Dam & Irrig. Co.*, for example, New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande River was challenged. The Court unhesitatingly held that "as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." The Court noted that there are two limitations to the States' exclusive control of its streams-reserved rights 'so far at least as may be necessary for the beneficial uses of the government property,' and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters. 'Unquestionably the State...has a right to appropriate its waters, and

the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed.'

Similarly, in *Kansas v. Colorado,* 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956 (1907), the United States claimed that is had a right in the Arkansas River superior to that of Kansas and Colorado stemming from its power 'to control the whole system of the reclamation of arid lands.' The Court disagreed and held that state reclamation law must prevail. The United States, of course, could appropriate water and build projects to reclaim its own lands. 'As to those lands within the limits of the States, at least, of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property.' But federal legislation could not 'override state laws in respect to the general subject of reclamation.' '[E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.' With respect to the question that had been presented in *Rio Grande Dam &*

> *Irrig. Co.,* the Court reaffirmed that each State 'may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State.'

California v. United States at 662-63 (internal citations omitted). The Court went on to state the purpose bind congressional the deference:

> As representative Sutherland, later to be a Justice of this Court, succinctly put it, 'if the appropriation and use were not under the provisions of state law the utmost confusion would prevail.' Different water rights in the same state would be governed by different laws and would frequently conflict. A principle motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality. Congress also intended to 'follo[w] the well-established precedent in national legislation of recognizing local and

> State laws relative to the appropriation and distribution of water.' . . . 'Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard.'

California v. United States at 668-69 (citations omitted). It is against the backdrop of this historical context and established legal principles that section 10 must be read. Simply put, if Congress had intended to deviate from this historical practice and ignore the "utmost confusion [that] would prevail" by having different water rights in the same state governed by different laws it would have made it unequivocal in section 10 that it intended to convey a "water right" and provided more details regarding the scope and nature of the right and how the right was to be administered.

H. Contemporaneous agency interpretations and applications of section 10 do not support the grant of a water right. The City's historical conduct in appropriating water pursuant to state law also does not support the grant of a water right.

On September 1, 1888, following the enactment of The Pocatello Townsite Act, the

Commissioner of Indian Affairs requested an opinion from Assistant Attorney General George Shields regarding the scope of section 10. In response, Shields issued an opinion letter on the interpretation of section 10.

> In view of the fact that the provision of said section of the statute is in derogation of the rights of the Indians as secured by treaty, I am of the opinion that the grant should be strictly construed . . . . . In other words, the statute authorizes those, at the time citizens of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that purpose to construct, operate, and maintain a canal. This right is in the nature of a mere license – authority to do an act, which without such authority would be illegal. . . . I conclude that the right so granted to said citizens is a personal one, and not assignable under present law.

Greenwald Affidavit, p. 32, fn. 139. Shield's interpretation does not even mention a water right. It is clear from his interpretation that he believed section 10 was not intended to grant a water right. First, the opinion states that the "statute is in derogation of the rights of Indians as secured by

treaty." The treaty did not address water rights. Second, as to the right of access for the purpose of bringing water to the town, Shields characterized the nature of the right as a "mere license." At best, any right to the use of water would be co-extensive with or no greater a right than that pertaining to the access, namely a license.

Following the issuance of the opinion the citizens of Pocatello began to appropriate water according to state law by posting notices of water rights. The notices expressly provided: "[w]e the undersigned, citizens of Pocatello, Idaho by an act of the Fiftieth Congress Setting Aside the Townsite of Pocatello, in the Fort Hall Reservation, **and the laws of the State of Idaho, hereby locate and claim.** . . ." Thereafter, the City of Pocatello has consistently appropriated its water rights in accordance with state law, some of which have already been adjudicated according to state law.

4. The plain meaning of the section 10 language established a right of access across the reservation for the use of water.

In light of the historical framework in which Section 10 was adopted, the Court can now apply the plain meaning of the phrase "shall have the free and undisturbed use in common with said Indians of the waters . . . ." Prior to federal regulation of public lands and state regulation of water the public at large was not prohibited from using the resources. This did not establish a vested

right but merely showed the absence of any meaningful regulation. Rather it was an implied license or a "use in common." At the time of the Pocatello Townsite Act the Tribe did not have an established water right. The Tribes' treaty negotiations did not address water rights. It would not be for another twenty years with the emergence of the concept of a federal reserved water right that the Tribes' would have a basis for their water rights. Section 10 is not the basis for the Tribes' now recognized water right. On its face, section 10 did not establish any greater right to the use of water than believed to be held at the time by the Tribes. At the time the right could have only been recognized as the same unregulated use shared by the public at-large. The problem for the citizens of Pocatello was that the available sources were located on the reservation and the Tribes controlled the access. Historically it was an axiom of the west that by default whoever controlled access to the water essentially controlled the water with or without a recognized water right.[12] The phrase "free and undisturbed use in common" modifies "with said Indians" which expressly prevented the Indians from interfering with the City's use of the water. The only means by which the Tribes' could interfere with the City's use of the water is by

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[12] In the context of water rights on public grazing lands there is a long history of federal legislation aimed at preventing the monopolization of water through controlling access to available water as opposed to expressly reserving the water.

denying them access to the water supply and the construction of diversion works etc. Accordingly, section 10 authorized the citizens of Pocatello to enter the reservation to access available water without interference from the Tribes. Such right of access to use water did not carry with it a water right. The State of Idaho provided an example in its brief which the Court finds to be on point.

> Assume that landowner no. 1 has a small lake completely contained on his property and that landowner no. 2 with an adjacent cabin and lot desires to use the water from this small lake for domestic use in his cabin. Landowner no. 1 executes and delivers to landowner no. 2 a license (i) for a pipeline right of way and (ii) for removal of water from the lake for use in the cabin of landowner no. 2. This grant of a license for a right of way and for the removal of water did not create a water right. The second landowner still has to acquire that water right in accordance with applicable law. The second landowner's diversion of water from the small lake and application of that water to a beneficial use creates the water right for the second landowner. The issuance of the license by the first

landowner did not create a water right.

State of Idaho's Brief in response to City of Pocatello's Opening Brief on Challenge at 19.

The Court holds that section 10 created a right of access across the reservation for the citizens of the Pocatello to use or appropriate water according to state law.

VII.
CONCLUSION

In conclusion, in construing section 10 this Court applied the general rule regarding a state's plenary control over its water resources as has been consistently enunciated by the United States Supreme Court. If there is to be carved out yet another exception to the federal government's historical deference to state law that determination will have to come from the Idaho Supreme Court. For all of the foregoing reasons, the ruling of the Special Master is **affirmed**.

VIII.
ORDER DISALLOWING FEDERAL WATER RIGHT CLAIM 29-11609

IT IS HEREBY ORDERED that the above-captioned federal law basis for the water right claims: 29-00271, 29-00272, 29-00273, 29-04222, 29-07431, 29-02274, 29-02338, 29-02354, 29-02382,

29-02401, 29-02499, 29-04221, 29-02499, 29-04221, 29-04223, 29-04224, 29-04225, 29-04226, 29-07106, 29-07118, 29-07119, 29-07222, 29-07322, 29-7375, 29-07450, 29-07502, 29-07770, 29-07782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, and 29-13560 is hereby **disallowed** and shall not be confirmed in any partial decree or in any final unified decree entered in SRBA Case No. 39576, in whatever form that final decree may take or be styled.

XI.
RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated October 6, 2006

/s/ John Melanson
JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

Appendix C

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls

In Re SRBA

Case No. 39576

Water Right No. 29-12877

RECOMMENDATION ON MOTION TO ALTER OR AMEND

I. PROCEDURAL BACKGROUND

The Citizens of the Pocatello Townsite (hereafter "Citizens") filed a claim for this water right based on federal law. The Citizens' claim is based on an Act of Congress in 1888. An ***Order Granting United States', State of Idaho's, and Shoshone-Bannock Tribes' Motions for Summary Judgment; and Order Denying City of Pocatello's Motion for Summary Judgment*** issued, holding that the Act of 1888 did not grant a federal water right. *A Special Master's Report and Recommendation* issued, recommending, that this water right not be confirmed in any partial or final decree. A complete procedural history of this subcase is included in the ***Order on Summary Judgment.***

The City of Pocatello filed *a Motion for Reconsideration or in the Alternative, After Entry of*

the Special Master's Report and Recommendation, Motion to Alter or Amend on August 15, 2005. The City of Pocatello later withdrew *its Motion to Alter or Amend* as to this subcase. *See* ***Order on Motion to Withdraw Motion*** *for Reconsideration* (Sept. 14, 2005). The Citizens filed a *Motion to Alter or Amend. A* hearing on the motion was held November 30, 2005.[1]

II. STANDARD OF REVIEW

Motions to Alter or Amend must be filed within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet. ***AO1 § 13.*** The Citizens filed a timely *Motion to Alter or Amend.* The State of Idaho, the United States, the Shoshone-Bannock Tribes, and the City of Pocatello filed responsive briefing.

III. ANALYSIS

The hearing on the *Motion to Alter or Amend* focused on whether the ***Order on Summary Judgment*** *and* ***Special Master's Report and Recommendation*** correctly analyzed the language of the Act of 1888. The Citizens' claim asserts that Section 10 of the Act of 1888 granted it a federal water right. Section 10 sets forth:

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[1] A somewhat similar claim was filed by the City of Pocatello in subcase 29-11609. *A Motion to Alter or Amend was* also filed in that subcase.

> Sec. 10. That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide *said* town with proper water and sewerage facilities.

Act of September 1, 1888, ch. 936, 25 Stat. 452 (hereafter "Act of 1888").

The ***Order on Summary Judgment*** held that Section 10 of the Act of 1888 granted a right of access, but not a water right. The Citizens argue that Section 10 granted a water right; therefore, the Citizens allege the claim contained all the necessary elements of a water right. Additionally, the Citizens assert that the tribal rights established by the *1990 Fort Hall Indian Water Rights Agreement* change the analysis of Section 10. The Citizens apparently assert that the agreement results in a finding that Section 10 did grant a water right.

A. The Act of 1888

The Citizens' claim to this water right is clearly based on the Act of 1888. *The* ***Order on Summary Judgment*** addressed the question of whether the Act of 1888 granted a federal water right.[2]

The United States, the Shoshone-Bannock Tribes, and the State of Idaho filed motions for summary judgment asserting that the Act of 1888 did not grant a water right. The Citizens did not file any motions, briefs, or affidavits on summary judgment.

The ***Order on Summary Judgment*** held that the language of Section 10 of the Act of 1888 resolved trespass issues and granted a right of access to water sources but did not grant a federal water right. The ***Order on Summary Judgment*** analyzed the statutory language of section 10, considered historical documents and affidavits filed by other parties, and considered alternative theories under which a federal water right could be asserted. The ***Order on Summary Judgment*** concluded that the Section 10 did not convey a

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[2] Potentially, there is a second question regarding "To whom the grant was made?" as between the City of Pocatello and the Citizens. The ***Order on Summary Judgment*** and the ***Special Master's Report and Recommendation*** did not reach this second question because those orders concluded that the Act of 1888 did not convey a federal water right.

federal water right and, therefore, the Citizens did not allege "genuine issues of material fact." On further review, it is apparent that the ***Order on Summary Judgment*** correctly analyzed Section 10.

B. Claim by the Citizens

The Citizens' claim asserts entitlement to a federal water right based on the Act of 1888. In the *Motion to Alter or Amend,* the Citizens contend that the claim itself is sufficient to overcome the *Motions on Summary Judgment.* That argument cannot prevail because the ***Order on Summary Judgment*** did not find the Act of 1888 to be a legal basis for a federal claim. The ***Order on Summary Judgment*** concluded that the Act of 1888 did not grant a water right. In light of that holding, the Citizens' claim is insufficient to establish "genuine issues of material fact" to overcome a summary judgment ruling.

A court looks to the pleadings, depositions, admissions, and affidavits to determine whether summary judgment is appropriate. I.R.C.P. 56(c). The claim by the Citizens stated that it was based on the Act of 1888. It is not known whether other facts or theories exist which support a water right claim by the Citizens. The claim did not assert other theories or facts. Parties are required to present "genuine issues of material fact" during the summary judgment process. Motions for summary judgment are decided upon the facts shown and not upon facts that might have been shown. *Verbillis v.*

Dependable Appliance Co., 107 Idaho 335, 689 P.2d 227 (Ct. App. 1984).

In this instance, the ***Order on Summary Judgment*** determined that the Act of 1888 did not grant a federal water right. Therefore, the claim itself, based on the Act of 1888, is not sufficient to create a "genuine issue" as to any material fact.

C. The *1990 Agreement*

The Citizens assert that the *1990 Fort Hall Indian Water Rights Agreement* (hereafter "*1990 Agreement*") favors a finding of a federal water right. The court assumes the Citizens argument is similar to that of the City of Pocatello in subcase 29-11609.

This argument arises from language in the *1990 Agreement* acknowledging the unresolved claim by the City of Pocatello. The *1990 Agreement* anticipated that a court would at some time determine the validity of the City Pocatello's claim under the Act of 1888. Thus, the *1990 Agreement* provided that "in the event the City of Pocatello is determined to be entitled to such a right, such right shall be in addition to the Tribal water rights set forth in this Agreement." *1990 Fort Hall Indian Water Rights Agreement* at 64, 66. The argument is that the *1990 Agreement* established tribal water rights and that any additional rights would not diminish tribal rights. That analysis merits review

because the ***Order on Summary Judgment*** applied case law on diminishment of tribal rights.

The basis of the Citizens' claim, however, contradicts this argument. The Citizens claim that Section 10 of the Act of 1888 conveyed a share of the tribal water right "in common with the said Indians." The *1990 Agreement* does not change the analysis. The *1990 Agreement* merely refers to claims that were unresolved in 1990. Because the Citizens' claim is to a shared portion of the tribal right, it would clearly diminish the Tribes' water rights. The ***Order on Summary Judgment*** correctly applied the diminution analysis and correctly held that Section 10 of the Act of 1888 did not convey a water right.

IV. CONCLUSIONS OF LAW

The *1990 Agreement* resolved and quantified tribal rights. It did not alter the grant contained in the Act of 1888 or change the analysis a court must apply to congressional language that could diminish tribal water rights. The Citizens' claim stated that it was based on the Act of 1888. The Act of 1888 was analyzed thoroughly in the ***Order on Summary Judgment***, which concluded that the language of Section 10 of the Act of 1888 was not "clear and plain" enough to express congressional intent to grant a federal water right. Instead, the ***Order on Summary Judgment*** concluded the language granted a right of access to water sources.

The Citizens' claim stated that it was based on the Act of 1888. Since the ***Order on Summary Judgment*** held that the Act of 1888 did not convey a water right, the claim is insufficient to overcome summary judgment. If some other factual or legal basis existed in support of the claim, the Citizens were required to establish that during the summary judgment process.[3]

Accordingly, the *Motion to Alter or Amend* is **denied**.

Dated February 8, 2006.

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

[3] It should be noted that the Citizens did not participate in the briefing or oral argument on summary judgment, nor did the Citizens file any affidavits or depositions in support of their position. A more complete factual and legal analysis was provided in subcase 29-11609, which also analyzed whether the Act of 1888 granted a federal water right. It is assumed that subcase 29-11609 will be looked to for establishing law of the case in the SRBA on this issue.

Appendix D

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls

In Re SRBA

Case No. 39576

Subcase Nos. 29-11609 and 29-12877

ORDER GRANTING UNITED STATES', STATE OF IDAHO'S AND SHOSHONE-BANNOCK TRIBES' MOTIONS FOR SUMMARY JUDGMENT; and ORDER DENYING CITY OF POCATELLO'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

The matters presented on summary judgment involve the legal issue of whether either the City of Pocatello or the Citizens of the Pocatello Townsite is entitled to a federal water right under an 1888 Act of Congress. The City of Pocatello (hereafter "Pocatello") filed claims for its water rights based on federal law under Subcase 29-11609. Pocatello also filed duplicate claims to the same water based on state-law theories.[1] The

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[1] The state-based subcase numbers are: 29-271, 29-272, 29-273, 29-2274, 29-2338, 29-2354, 29-2382, 29-2401, 29-2499, 29-4221, 29-4222, 29-4223, 29-4224, 29-4225, 29-4226, 29-

Citizens of the Pocatello Townsite (hereafter "the Citizens") essentially duplicated the federal claim by Pocatello, but asserted it owned the federal-based water right under subcase 29-12877. The Citizens did not file a claim under state-law theories.

The Idaho Department of Water Resources filed *Director's Reports* which recommended the state-law claims. IDWR did not file *Director's Reports* for 29-11609 or 29-12877, since those claims were based on federal law. IDWR filed abstracts for the federal-law based claims.

The State of Idaho, the United States, and the Shoshone-Bannock Tribes filed *Objections* to the federal claims of Pocatello and the Citizens. Pocatello filed an *Objection* to the claim of the Citizens.

The parties filed cross-motions for summary judgment. Pocatello moved under I.R.C.P. 56 for a ruling that it is entitled to a federal water right. The State of Idaho, the United States, and the Shoshone-Bannock Tribes filed motions for summary judgment asserting that neither Pocatello nor the Citizens is entitled to a federal water right. The Citizens did not file a summary judgment

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7106, 29-7118, 29-7119, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7502, 29-7770, 29-7782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13636, 29-13637, 29-13638, and 29-13639.

motion, did not participate in the briefing, and did not attend the hearing. A hearing was held on these motions and cross-motions for summary judgment. The issue before the court is:

Whether, as a matter of law, either the City of Pocatello or the Citizens of the Pocatello Townsite is entitled to a federal water right based on Section 10 of the Act of 1888.

II. FACTUAL BACKGROUND

A. Reservation and Treaty

United States President Andrew Johnson set apart lands for the reservation currently inhabited by the Shoshone and Bannock Indian Tribes with an executive order issued June 14, 1867. *Affidavit of Emily Greenwald* (hereafter "*Greenwald*") att. B. at 16; *Affidavit of Douglas R. Littlefield Dated January 14, 2005, In Support of Pocatello's Motion for Summary Judgment* (hereafter "*Littlefield*") at 5. The Second Treaty of Fort Bridger relating to the Fort Hall reservation was signed July 3, 1868. *Littlefield* at 5. The Second Treaty of Fort Bridger required written consent of a majority of adult male Indians for any cessions of land. (Executive Order of June 14, 1867, attached hereto as Exhibit 1; Second Treaty of Fort Bridger attached hereto as Exhibit 2.)

B. Traffic and Trespass

By 1870, there was considerable freight traffic in the vicinity of the Fort Hall Reservation. In 1878, the Utah Northern Railway Company (owned by Union Pacific Railway Company) built a north-south line across the Fort Hall Reservation without obtaining permission from either the Tribes or the Federal Government. *Greenwald* att. B. at 18. Railroad activity on the reservation resulted in trespass by railroad employees and other settlers. The right-of-way for the north-south route was not addressed for several years. *Greenwald* att. B. at 20. However, the Utah Northern Railway Company did negotiate with the Tribes for an east-west right-of-way on behalf of the Oregon Short Line. The terms of the agreement for the east-west route were signed in July 18, 1881, and approved by Congress on July 3, 1882. *Greenwald* att. B. at 20.

By 1884, the Utah Northern Railway Company had still not obtained a right-of-way for the north-south line that was constructed in 1878. There was a significant problem with trespassing on the reservation. *Greenwald* att. B at 22. In October 1885, United States Department of the Interior officials and Indian Agent Peter Gallagher ordered the removal of intruders. *Greenwald* att. B. at 23. In 1886, a group of citizens sent a petition asking Indian Agent Gallagher for leniency regarding the trespass. They explained that many of the trespassers were employees of the railroad

and could not keep their jobs without trespassing on the reservation in some manner. The United States Secretary of the Interior S. J. Kirkwood wrote to the president of Union Pacific Railway Company in 1881 asking that the right-of-way issue be addressed. *Littlefield* at 10.

In May 1886, the railroad companies asked the United States Secretary of the Interior to assist in negotiations with the Tribes. *Greenwald* att. B. at 24. The United States Department of the Interior stated that "any agreement that may be entered into with the Indians for cession of the necessary quantity of land at the point named [Pocatello] should be in the nature of a cession to the United States-to be disposed of for the benefit of the Indians. . . ." *Greenwald* att. B. at 25.

C. Council of 1887

The trespass situation was so controversial that in 1886 Acting Commissioner of Indian Affairs A. B. Upshaw wrote to the United States Secretary of the Interior requesting a conference with the Indians. Commissioner Upshaw explained that previous orders to remove non-Indians from the reservation had been ignored. *Littlefield* at 14-15. Commissioner Upshaw stated that railroad employees had built dwellings on the reservation for shelter during the winter. *Littlefield* at 16. Commissioner Upshaw concluded that removing the trespassers might be impossible without

military aid or, possibly, bloodshed. *Littlefield* at 16.

In May 1887, the United States Secretary of the Interior responded to the trespass problem and assigned Inspector Robert S. Gardner and Indian Agent Peter Gallagher to conduct negotiations with the Shoshone-Bannock Indian Tribes. *Greenwald* att. B. at 16. Inspector Gardner and Agent Gallagher met with the Tribes and held formal negotiations on May 27, 1887. The Union Pacific Railway Company was represented by Mr. E. Dickinson. Inspector Gardner and Agent Gallagher represented the United States, and a number of Shoshone and Bannock Indians represented the Tribes.

During the May 1887 council, Agent Gallagher opened the council by explaining that the meeting was to resolve the presence of the railroad and the community at Pocatello on the reservation. *Littlefield* at 18. Several Tribal representatives stated that they did not want to sell any land. *Greenwald* att. B. at 27. Agent Gallagher commented "Now Big Joe, over there, what does he say? He says he does not want to sell; that they have not water enough. There is water enough to attend to the work they do now. How is Big Joe or any other Joe on this reservation to get water. . . ? How are you going to make ditches; how are you going to irrigate land unless you have money?" *Greenwald* att. B. at 28.

D. Agreement Reached

The Shoshones and Bannocks were reluctant to cede land for the railroad and the townsite of Pocatello. Eventually, the lengthy discussions changed their minds, and they signed the Cession Agreement of May 27, 1887. *Greenwald* att. B. at. 28; *Littlefield* at 21. The Utah Northern Railway Company secured land for the right-of-way of the existing tracks, and land was ceded for the Pocatello townsite. The agreement also included "necessary grounds for station and water purposes. . . ." *Greenwald* att. B. at 28.

E. Congress Acts

Inspector Gardner and Agent Gallagher sent the Cession Agreement of May 27, 1887, to the United States Secretary of the Interior on May 30, 1887. The agreement was ratified by Congress in the Act of September 1, 1888. (Attached hereto as Exhibit 3.)

III. STANDARD OF REVIEW

The standard of review for summary judgment is well established. I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any. . ." to determine whether the moving party is

entitled to judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *Strongman v. Idaho Potato Commission*, 129 Idaho 766, 771, 932 P.2d 889, 894 (1997) (*quoting* I.R.C.P. 56(c)).

If the record supports conflicting inferences or if reasonable minds might reach different conclusions, summary judgment should be denied. *Id.* The filing of cross-motions for summary judgment by opposing parties does not, in itself, establish that there is no genuine issue of material fact. Where facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court, alone, will be responsible for resolving conflict between those inferences. *First Security Bank v. Murphy,* 131 Idaho 787, 964 P.2d 654 (1998). The issue on summary judgment presents no factual disputes. The resolution of this issue is purely a question of law.

IV. FEDERAL RESERVED WATER RIGHTS

Pocatello conceded in its briefing and during oral argument that it does not now claim a federal reserved water right. However, since Pocatello's claim asserted a "federal reserved" basis, this decision addresses that theory briefly.

Federal law on reserved water rights is well established. A state has plenary control of water located within its territory. *Kansas v. Colorado,* 206 U.S. 46 (1907). Federal courts have described claims to federal reserved water rights as exceptions to the state's plenary control of water. *United States v. Rio Grande Dam and Irrigation Co.,* 174 U.S. 690 (1899). A reserved water right must be based on a reservation of land. *Arizona v. California,* 373 U.S. 546 (1963). Reserved water rights may be express or implied. *United States v. New Mexico,* 438 U.S. 696 (1978).

Federal reserved water rights on Indian reservations were first defined by the United States Supreme Court in *Winters v. United States,* 207 U.S. 564 (1908). The *Winters* Court held that lands set aside for an Indian reservation included an implied reservation for the amount of water necessary to meet the purposes of the reservation.

An express reservation of water is created by the explicit language in the act creating the land reservation. *United States v. New Mexico,* 438 U.S. 696. If there is not an express reservation of water included in the land reservation, an implied reserved water right may be granted if the following criteria are satisfied:

1) An implied reservation of water exists only if necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created, *Id.* at 702;

2) The water claimed must be the minimum amount necessary to achieve the purposes of the reservation, *Id.* at 700; and

3) Without the minimum amount of water claimed, the purposes of the reservation must be entirely defeated, *Id.*

Central to a finding of a federal reserved water right is a federal reservation of land. It is undisputed that no land was reserved for Pocatello or the Citizens. Thus the crucial element of a federal reserved water right is absent.

Neither Pocatello nor the Citizens presented "genuine issues" of "material fact" on which a federal reserved water right could be based. The required elements of a federal reserved water right have not been established. As a matter of law, neither subcase 29-11609 nor 29-12877 can establish a federal reserved water right.[2]

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[2] This Special Master has also considered whether Pocatello's claim could be supported under a new theory of federal non-reserved water right. Research found no federal case law on federal non-reserved water rights. The term "non-reserved federal right" arose in a Department of the Interior Solicitor's Opinion in 1979. In *86 Interior Decision*, 553, 1979 WL 34241, Solicitor Leo Krulitz opined that the federal government could appropriate a water right without a reservation of land and while complying with the processes of state law. The Krulitz Opinion stated such federal non-reserved water rights were valid even if they did not follow substantive state law. Two subsequent solicitor's opinions rejected or at least narrowed

V. ALLOTMENT-BASED RIGHTS

Courts have recognized water rights on former reservation lands that are no longer in tribal control where they relate to Indian allotments. This category of water rights relates to the General Allotment Act passed by Congress in 1887. 25 U.S.C. § 334, *et seq.* The General Allotment Act provided for individual Indians to receive an allotment of land for agricultural purposes.

The United States Supreme Court held in *United States v. Powers,* 305 U.S. 527 (1939), that the goal of allotments was to encourage individual tribal members to farm and reasoned that allotted lands were of no agricultural value without irrigation. *Id.* at 533. In *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981), *cert. denied,* 454 U.S. 1092 (1981), the Court of Appeals for the Ninth Circuit ruled that a non-Indian successor to an allotment obtains a right to water that quantity actually appropriated by the Indian allottee at the time title to the allotment passes. The Court reasoned that an Indian allottee has the right to sell his land along with his share of the reserved water right. However, the non-Indian

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the Krulitz Opinion. *See 88 Interior Decision,* 253 (1981) and *88 Interior Decision 1055 (1981).* The concept of federal non-reserved water rights is not what Pocatello claimed and does not appear to have been sanctioned by any court.

successor loses his right to the full measure of the allottee's water right if he does not maintain that right by continuous use. *Id.* at 50.

Water users in Wyoming argued for expansion of the *Walton* doctrine in the Big Horn River Adjudication. They argued for the extension of water rights to lands that were originally part of the Wind River Indian Reservation, but which were never owned by Indian allottees. *Big Horn IV,* 899 P.2d 848, 850 (1995). These parties argued that federal water rights should be recognized as appurtenant to land that was ceded from the reservation. They argued that a priority date as of the date of the reservation should attach to the water rights. The Wyoming court described these claims as "super-*Walton* rights" because such rights would have expanded on the traditional *Walton* right by deleting the requirement that land title trace to an Indian allotment.

The Wyoming Supreme Court rejected these "super-*Walton*" rights, holding that only the tribes, Indian allottees, and successors in title of Indian allottees should receive appurtenant reserved water rights with an 1868 priority date.

Neither Pocatello nor the Citizens asserted they obtained an Indian allotment. The land ceded from the Fort Hall Reservation that became the Pocatello townsite was not allotted. Neither Pocatello nor the Citizens presented "genuine issues" of "material fact" showing the required

elements of a water right under the *Walton* line of cases.

VI. THE CONGRESSIONAL ACT OF 1888

Pocatello argues that a federal water right was granted by the Act of September 1, 1888, in conjunction with land ceded for the townsite. Pocatello argues that the language of Section 10 of the Act of September 1, 1888, granted a water right:

> Sec. 10. That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

Act of September 1, 1888, ch. 936, 25 Stat. 452, (hereafter "Act of 1888").

The United States, the Shoshone-Bannock Indian Tribes, and the State of Idaho assert that this language only conveyed access to water sources. The critical question is whether Section 10 granted a federal water right or whether that language granted mere access to reservation water sources.

A. Treaty Law

Pocatello argues that Congress granted it federal water rights in hand with the grant of the townsite. As this court sees it, that assertion of a federal water right would be a diminution of reservation or tribal rights. If Pocatello's assertion of a federal water right would diminish tribal rights, Indian treaty law must be considered. The law in that area is clear. Only Congress can alter the terms of an Indian treaty by diminishing a reservation. *United States v. Celestie,* 215 U.S. 278, 285, (1909). The touchstone in determining whether a given statute diminished or retained reservation boundaries is congressional purpose. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). Congressional intent to diminish a reservation must be clear and plain. *United States v. Dion,* 476 U.S. 734, 738-739 (1986).

B. Statutory Language

Where the language of a statute is clear and unambiguous, a court gives effect to the statute as written and should not engage in statutory

construction or resort to legislative history. *Idaho v. Pauls,* 101 P.3d 235, 238 (Ct. App. 2004). If, on the other hand, a statute is ambiguous, a court reviews the legislative history and applies the rules of statutory construction to ascertain the intent of the legislation. *Id.*

The purpose of the Act of 1888 was to address historical right-of-way and trespass issues on the reservation. The north-south railroad route was built without obtaining a right-of-way and without consent of the Shoshone-Bannock Indian Tribes. In addition to the tracks, railroad stations and buildings were constructed on the reservation in trespass. Railroad employees and settlers unloading freight and conducting business were trespassers on the reservation. The trespass and unauthorized activity caused social unrest on the reservation. Congress was urged to act to prevent violence. The Council of 1887 was, therefore, convened and the Act of 1888 was passed.

Article I of the Act of 1888 describes the cession by the Tribes of the land on which the Utah Northern and Oregon Short Line Railways had their tracks. Article II sets forth terms for ceding the railroad right-of-way. Article III sets forth the details of the cession. Sections 2 through 9 of Article III describe procedures for the survey, appraisal, and sale of the lands within the Pocatello townsite. Section 11 grants a right-of-way for the previously unauthorized tracks. Section 12 allows

necessary employees of the railroad to live on the right-of-way. Section 13 requires the railroad to fence portions of its road. Section 14 provides for a bond to secure against railroad damages. Section 15 contains conditions of acceptance by the railroad. Section 16 provides that Congress may amend, alter, or appeal the act.

The key phrases contained in Section 10 demonstrate that the thrust of the Act of 1888 was to solve trespass issues.

1. "Free and Undisturbed Use . . . of the Waters"

Section 10 states that the citizens of the town shall have the "free and undisturbed use in common with the said Indians." Pocatello argues that this language conveys a water right. However, the term "free and undisturbed use" is more properly understood as describing a right of access.

Section 10 did not use the phrase "water right" in describing what was granted. The inclusion of the term "use" does not clearly and plainly show congressional intent to grant a federal water right. Without Section 10, the citizens of the town were trespassers on the reservation at any time that they diverted water from any of the water sources. When Congress allowed for "free and undisturbed use . . . of the waters," the citizens of the town were granted a right to access points of diversion and to remove the water from sources on

the reservation. Without this "free and undisturbed" right of access or use, the citizens of the town would have been trespassing. Congress acted to resolve trespass issues, and this phrase did that by conveying the ability to access water.

Pocatello cites *Byers v. Wa-Wa-Ne,* 86 Or. 617, 169 P.121 (1917), as an example of congressional action showing that Congress knew how to grant federal water rights. Byers succeeded to the rights of permittees who had an 1870 revocable permit from the Department of the Interior for construction of a ditch on the Umatilla Reservation in Oregon. The rights under the permit were used for water power for the operation of a flour mill.

In 1882, the Pendleton Townsite Act was passed, conveying 640 acres of the Umatilla Reservation to the Town of Pendleton. In 1885, Byers' license was converted into a water right with the Allotment Act of 1885. The Oregon Supreme Court held that the language of the Allotment Act created a water right. *Byers* at 169 P.121. However, that case seems inapposite to Pocatello's position. The statutory language from the 1885 Allotment Act used the phrase "water right," not use. The 1885 Allotment Act stated:

> Provided further, that the water right across a portion of said reservation from the town of Pendleton granted by the Interior Department July seventh,

> eighteen hundred and seventy on the application of George LaDow, Lot Livermore and other citizens of Pendleton for manufacturing, irrigating and other purposes be confirmed and continued to W.S. Byers and Company their successors: Provided, That this act shall in no way impair or affect any existing right to a reasonable use of the water of said stream for agricultural purposes, nor shall confirm or grant any right to use the water thereof in any manner nor to any extent beyond or different from that to which it has been heretofore appropriated.

1885 Allotment Act, Ch. 319, 23 Stat. 343, § 2.

The *Byers* court held that the language in the statute confirmed a preexisting license and created a permanent water right, or an irrevocable water right. The court's ruling in *Byers* hinged on the view that Congress would not have acted to grant a right that already existed, but must have acted to change what was in effect prior to the enactment. In *Byers*, the court held that the phrase "water right" in conjunction with the phrase "confirmed and continued" conveyed a water right. So Congress was familiar with the phrase "water right" as early as 1885, but chose not to use it in the Act of 1888.

2. "In Common With the Said Indians"

Pocatello argues that the "in common with the said Indians" language granted a proportional share of the Tribes' federal reserved water right. Pocatello cites the United States Supreme Court case *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979) (hereafter *Fishing Vessel*), for the proposition that the "in common with" language in treaties has been interpreted to require sharing of the resource in question. Pocatello correctly notes that the *Fishing Vessel* case held that the "take" of fish was to be shared proportionally. Pocatello argues that it was the interpretation of the "in common" language that was pivotal in *Fishing Vessel.* Therefore, Pocatello argues that the "in common" language in Section 10 entitles Pocatello to share in common with the Shoshone-Bannock Tribes' "exclusive right to waters on the reservation." The "in common" language in Section 10 may create a sharing of what was granted; however, the "in common" language does not bootstrap a grant of access into a water right.

Critically, *Fishing Vessel* had two important components. First, the case applied the "in common" language to the right conveyed – a fishing right. Second, the case interpreted the "in common" language to quantify the right to take fish. "In common" meant a sharing of what it modified. In

Fishing Vessel, "in common" modified the fishing right. Thus the tribe in *Fishing Vessel* had a shared fishing right.

In contrast, the Act of 1888 uses the "in common" language to modify "use . . . of the waters." The "in common" language does not, by itself, convey a water right any more than the "in common" language conveyed a fishing right in *Fishing Vessel.* The United States Supreme Court in *Fishing Vessel* looked to the "in common" language to determine the characteristics or quantification of the fishing right. Without the critical treaty language "right of taking fish," however, the "in common" language would have had a different application. The *Fishing Vessel* analysis may indicate that whatever was granted to Pocatello is to be shared, but that case does not elucidate whether the grant was a water right or a right of access.

The phrase "in common with the said Indians" is also similar to a phrase that was recently analyzed by the SRBA District Court. In ***Order on Motions to Strike, Motion to Supplement the Record, and Motions for Summary Judgment*** (Nez Perce Consolidated Subcase 03-10022) (November 10, 1999) at 30-37, the SRBA District Court held that the "in common" language in the Nez Perce Treaty did not create a water right. The SRBA District Court held that the treaty language reserved a right to fish, but did not create a water

right. "Nowhere in the Supreme Court's interpretation of the language is a water or other property right greater than an access or allocation right mentioned for purposes of giving effect to the fishing right, or as being within that scope of the fishing right." ***Nez Perce Order*** at 33.

The analysis of the "in common" language by the United States Supreme Court in *Fishing Vessel* and by the SRBA District Court in the ***Nez Perce Order*** are helpful in understanding whether the grant was exclusive or shared, but sheds little light on what the grant was.

3. "Right of Access at All Times"

The final phrase, "with right of access at all times thereto," shows a clear and plain congressional intent to grant a right of access. This language shows that the congressional intent of Section 10 was to grant a right of access, rather than a federal water right. In analyzing the critical phrases used in Section 10, it is apparent that the language is consistent with the overall scheme of the Act of 1888 which was to resolve trespass issues. Section 10 resolved a trespass problem. In order to hold that Congress conveyed a shared portion of the Tribes' federal water right, this court would have to determine that the language of Section 10 clearly and plainly conveyed a water right. It does not appear that the language meets that requirement by allowing access to water.

Section 10 did not grant a water right, rather it granted a right of access.

C. Historical Context.

A review of the historical context in which Section 10 was written bolsters the conclusion that Congress intended to grant a right of access. Courts look at historical documents in order to understand the words of old congressional acts and to determine the weight and meaning the words once carried in order to properly construe them. *See Ute Indian Tribe, v. State,* 521 F.Supp. 1072, 1079 (U.S.D.C. Utah) (1981), *affirmed in part, Ute Indian Tribe v. State*, 716 F.2d 1298 (10th Cir.) (1983), *on rehearing*, 773 F.2d 1087 (10th Cir.) (1985), *cert. denied*, 479 U.S. 994 (1986).

The Act of 1888, including the critical Section 10, was passed by the United States Congress to "ratify an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes." Message from the President of the United States, 25 Stat. 455; H.R. Exec. Doc. No. 140, 50th Cong. 1stSess. (1888).

Several historical documents relating to the Act of 1888 support the notion that the language conveyed a right of access, not a water right. First is a transmittal letter dated February 4, 1888, from Secretary of the Interior Wm. F. Vilas to the President of the United States providing a summary of the events that resulted in enactment of the Act of 1888. (Attached hereto as Exhibit 4.) His summary states that:

1) The Utah and Northern and Oregon Short Line railroads cross each other within the Fort Hall Indian Reservation at a location known as Pocatello Station, where railroad employees established a settlement.

2) Trespass occurring in the area caused the Department of the Interior to instruct the United States Indian Inspector and the Indian Agent to confer with the Indians and prepare for settlement of the trespass questions.

3) The Department of the Interior wanted to determine the compensation that should be paid to the Indians for the land occupied by the railroads.

4) The Utah and Northern Railway Company also sought land for workshops, stockyards, a water reservation and pipeline, and stipulated to pay $8 per acre. Secretary Vilas explained Section 10 as follows:

> The draught of bill provides that the land ceded for the town-site (except portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town-site

The outline by Secretary Vilas emphasizes the resolution of the trespass issues, and the explanation of the draft bill focuses on a right of access.

A second document that is instructive is a February 1888 letter from Commissioner of Indian Affairs J. D. C. Atkins to the Secretary of the Interior explaining the reason for including Section 10 in the Act. (Attached hereto as Exhibit 5.)

> Inasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its supply of water, I have deemed it advisable, as matter of precaution, to

> insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the waters of any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town with the right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as may be necessary to provide with proper water and sewerage facilities.

This language seems to infer that Section 10 was put into the Act as a "precaution," consistent with the granting of a right of access to get to the water without trespassing.

The third document is an 1891 letter from Assistant Attorney General George H. Shields providing a legal opinion of the effect of Section 10. (Attached hereto as Exhibit 6.) Mr. Shields wrote:

> In view of the fact that the provision of said section of the statute is in derogation of the rights of the Indians as secured by treaty, I am of the opinion the grant should be strictly construed . . .
>
> . . . In other words, the statute authorizes those, at the time citizens

> of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that purpose to construct operate, and maintain a canal. This right is in the nature of a mere license – authority to do an act, which without such authority would be illegal. . . . I conclude that the right so granted to said citizens is a personal one, and not assignable under present law.

The opinion by Assistant Attorney General George H. Shields is a contemporaneous interpretation of the Act of 1888 by an official charged with its administration. Such contemporaneous interpretations are entitled to great weight. *Aluminum Company of America v. Central Lincoln Peoples' Utility District,* 467 U.S. 380, 389 (1984) Shields concluded that the congressional grant in Section 10 was a mere license to go on the lands of the Indians for the purpose of bringing water to the town.

D. Implied Federal Water Rights

In addition to considering the historical context of the Act of 1888, it is helpful to understand the background of Indian reserved rights. The United States did not expressly convey water rights when it created reservations. Instead, it reserved the land, but was silent about conveying

water rights in executive orders setting apart reservation lands and in treaties.

Federal reserved water rights on Indian reservations were not created by express treaty language or congressional language, but were recognized by judicial decision. Indian reserved rights are, therefore, "implied" federal reserve water rights. Interestingly, these implied Indian water rights were first recognized by the United States Supreme Court in 1908, several years after the Act of 1888 was passed. In *Winters v. United States*, 207 U.S. 564 1908, the court explained:

> That the government did reserve them (the waters) we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant. . . ."

Winters at 577.

1. Purpose of Reservation

The *Winters* case was the first to recognize an implied reservation of water rights, and subsequent cases clarified the policy. Implied reserved water rights may be granted where necessary to fulfill the primary purposes for which

the reservation of land was created. *United States v. New Mexico*, 438 U.S. at 700-702. The 1868 Treaty of Fort Bridger established the reservation still held by the Shoshone-Bannock Indian Tribes. The purpose of the Treaty of Fort Bridger was:

> [T]o induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.

Skeem v. United States, 273 F. 93, 95 (9th Cir. 1921); *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928).

2. Tribes' Rights

To determine whether Pocatello or the Citizens were granted a portion of the reserved right from the Tribes, it is imperative to analyze the rights of the Tribes. The basis of Pocatello's argument is that Congress granted a portion of the Tribes' water right in conjunction with the ceding of land for a townsite. There is little support in law for the argument that Congress intended Indian water rights to be received by those who succeeded to title of land from sources other than Indian allottees. Where land is ceded, there is an inference that the Tribes determined they did not need that

land. Therefore, the ceded land does not relate any longer to the primary purpose of the reservation – to benefit the Tribes.

Ceded lands were the focus of the claim to "super-*Walton*" rights asserted in Wyoming's *Big Horn* adjudication. *See Big Horn IV*, 899 P.2d 848, 850 1995. The cession of lands to the federal government indicated to the *Big Horn* court that the Tribes no longer needed the ceded land. Since the Tribes no longer needed the lands for their reservation, the lands no longer needed water rights. Thus, the court reasoned that any federal water rights on ceded land ceased to exist. *Big Horn* at 853-854. The *Big Horn* analysis is applicable here.

The *Big Horn* Court correctly identified the policy underlying Indian reserved water rights as requiring benefits to the Indians. That judicial policy cuts against a finding that Congress conveyed a portion of the Tribes' water rights with the Act of 1888. The underlying question a court must ask is: **Would a finding of reserved water rights benefit the tribe or individual Indians?** The answer for *Walton* rights is "yes" because water rights appurtenant to allotment lands clearly make those lands more valuable to the Indians and would enhance the financial benefits to allottees, whether they held the land or sold it. The answer for land ceded to a townsite is "no."

Neither the Tribes nor individual Indians would realize any economic benefit from a water right on land ceded to a townsite because the lands passed from tribal control. Awarding a water right to ceded land would harm, rather than benefit, the Tribes. Such an action would lessen the reserved water right of the Tribes.

Therefore, allowing federal water rights related to the land cession for the Pocatello townsite is inconsistent with federal policy. Water rights on ceded land are not necessary for the primary purpose of the reservation and, thus, are not part of an implied federal reserve water right. A finding of a water right on ceded land would not benefit the Indians and would likely not be recognized by federal courts.

E. Pocatello's Compliance with State Law

It is interesting to note that Pocatello has complied with state licensing and transfer requirements for much of the state-based claims it asserts claim the same water as the federal claim. Pocatello has obtained state licenses for some of the water now claimed under a federal theory and has sought state permission to transfer other rights or to change elements such as points of diversion. Pocatello's compliance with state licensing and transfer proceedings is consistent with the view that it did not have a federal water right in 1888, but received a right of access. (A summary of

Pocatello's state-based claims is attached hereto as Exhibit 7.)

In Idaho, state water rights follow the prior appropriation doctrine and are defined by the state constitution and state statutes. To obtain a state water right, a user must have put the water to beneficial use prior to the mandatory permit and licensing statutes, or must have applied to the Idaho Department of Water Resources for a permit or license. If IDWR approves the permit application, the user generally has five years to "perfect" the water right by putting the water to beneficial use and submitting proof of the appropriation to IDWR. It is difficult to understand why Pocatello applied for state licenses and transfers if it held the federal "trump" card. In addition to the water rights which Pocatello licensed or transferred in compliance with state law, at least three rights were previously decreed.

Pocatello has consented to the adjudication of its rights, has gone through state licensing, or has applied to the state administrative agency for transfer of elements for most of the water now claimed under its federal theory. Those licenses and decrees may act as a legal impediment to now claiming the water under a federal theory.

The SRBA District Court has cited prior state licenses in a decision denying the federal basis of dual-based claims for the United States Mountain Home Air force Base. ***Order Disallowing***

Uncontested Federal Reserved Water Right Claims (Mountain Home Air Force Base) (Subcase 61-11783, 61-11784 and 61-11785) (April 6, 2001). As in that case, Pocatello's longstanding compliance with state licensing and transfer statutes may preclude Pocatello from asserting a federal basis for these claims. Three state-based water rights of Pocatello were previously decreed. The prior decrees are not yet part of the record, but the *Director's Reports* indicate they were previously decreed. All three have very old priority dates, but the dates are after the date of the reservation. The prior decrees may preclude Pocatello from relitigating and claiming a different priority and a different theory. The doctrine of *res judicata* precludes parties and their privies in a final litigation from relitigating in a second suit against the same parties, not only the same claim or demand, but also all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group,* 119 Idaho 146, 804 P.2d 319 (1990).

The doctrine of collateral estoppel or issue preclusion may also apply. A final judgment such as a decree is conclusive on the parties to the judgment and their privies as to the issues determined, and precludes the parties from later relitigating the same issues. Unlike the doctrine of *res judicata,* collateral estoppel binds the parties in later litigation with outsiders as well as with

parties to the first suit. *See Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1987).

Much of the water claimed here under a federal theory and also asserted under state law includes previously licensed water rights. The preclusive effect of previously issued licenses has previously been litigated in the SRBA.

Even if Pocatello's consent to licenses and administrative proceedings and transfer statutes is not dispositive of a federal-based claim, it is consistent with the Act of 1888 conveying a right of access rather than a federal water right.

VII. CONCLUSION

The question presented here is whether either Pocatello or the Citizens is entitled to a federal water right based on Section 10 of the Act of 1888.

Neither Pocatello nor the Citizens presented genuine issues of material fact that support a federal reserved water right. The Act of 1888 did not reserve land; it ceded land. Similarly, neither Pocatello nor the Citizens has alleged genuine issues of material fact that support a *Walton*-based water right. The Act of 1888 did not create any allotments. The question of whether Section 10 of the Act of 1888 granted a new type of federal water right is a case of first impression. After careful analysis of the language of Section 10, the facts,

and the case law, this Special Master finds that the language of Section 10 was not "clear and plain" enough to express an intent to gran a portion of the Tribes' water right. Instead, the language appears to have granted a right of access to water sources in order to resolve trespass issues. Implied federal reserved water rights are limited to the minimum quantity necessary for the primary purposes of the reservation. Here, the primary purpose of the reservation was to benefit the Indians and to create a homeland. Water relating to land ceded from the reservation seems to be outside the primary purpose requirement and is, thus, without a federal water right. Furthermore, the policy and purpose for which federal courts recognized federal reserved water rights is to provide a benefit to the Indian tribes and their members. It is difficult to attach any tribal benefit to diminishment or sharing of a reserved right. Although Pocatello makes an intriguing argument for extending it a federal water right, this Special Master holds that such a right was not granted to Pocatello or the Citizens.

IT IS THEREFORE ORDERED THAT:

1) The City of Pocatello's *Motion for Summary Judgment* is **denied**.

2) The *Motions for Summary Judgment* by the United States, the State of Idaho, and the Shoshone-Bannock Tribes are **granted**.

DATED July 28, 2005.

/s/ Brigette Bilyeu
BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

Appendix E

Supreme Court of Idaho
CITY OF POCATELLO, Appellant
v.
STATE of Idaho, UNITED STATES OF AMERICA and the SHOSONE-BANNOCK TRIBES, Respondents

Docket No. 33669
Ref. No. 08RH-12
In Re SRBA
Case No. 39576
Subcase No: 29-11609

ORDER DENYING PETITION FOR REHEARING

The Appellant having filed a PETITION FOR REHEARING on March 11, 2008 and supporting BRIEF on March 24, 2008 of the Court's Opinion released February 19, 2008; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 3rd day of April 2008.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record
West Publishing
Lexis/Nexis
Goller Publishing

Appendix F

Supreme Court of Idaho
CITY OF POCATELLO, Appellant
v.
STATE of Idaho, UNITED STATES OF AMERICA and the SHOSONE-BANNOCK TRIBES, Respondents

Docket No. 33669
In Re SRBA
Case No. 39576
Subcase No.: 29-11609

REMITTITUR

TO: FIFTH JUDICIAL DISTRICT, COUNTY OF TWIN FALLS.

The Court having announced its Opinion in this cause February 19, 2008, and having denied Appellant's Petition for Rehearing on April 3, 2008; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

IT FURTHER IS HEREBY ORDERED that inasmuch as no memorandum of costs was filed,

Respondents' cost award on appeal is hereby waived.

DATED this 3rd day of April, 2008.

Clerk of the Supreme Court
State of Idaho

cc: Counsel of Record
District Court Clerk
District Judge

Appendix G

Act of Sept. 1, 1888, ch. 936, 25 Stat. 452

An act to accept and ratify an agreement made with the Shoshone and Bannack Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made and entered into by the United States of America represented as therein mentioned, with the Shoshone and Bannack Indians resident in the Fort Hall Reservation, in the Territory of Idaho, and now on file in the office of Indian Affairs, be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a duly certified majority of all the adult male Indians of the Shoshone and Bannack tribes occupying or interested in the lands therein more particularly described, in conformity with the provisions of article eleven of the treaty concluded with said Indians July third, eighteen hundred and sixty-eight (Statutes at Large, volume fifteen, page six hundred and seventy-three), and is in the words and figures following, namely:

"Memorandum of an agreement made and entered into by the United States of America, represented by Robert S. Gardner, U. S. Indian Inspector, and Peter Gallagher, U. S. Indian Agent, specially detailed by the Secretary of the Interior for this purpose, and the Shoshone and Bannack tribes of Indians, occupying the Fort Hall Reservation in the Territory of Idaho, as follows:

ART. I. The said Indians agree to surrender and relinquish to the United States all their estate, right, title, and interest in and to so much of the Fort Hall Reservation as is comprised within the following boundaries, that is to say; and comprising the following lands, all in town six (6) south of range thirty-four (34) east of Boise Meridian.

West one-half section twenty-five (25); all of section twenty-six (26); east one-half section twenty-seven (27); northwest quarter section thirty-six (36); north one-half section thirty-five (35); northeast quarter of southwest quarter section thirty-five (35); northeast quarter of the northeast quarter of section thirty-four (34); comprising an area of eighteen hundred and forty (1840) acres, more or less, saving and excepting so much of the above-mentioned tracts as has been heretofore and is hereby relinquished to the United States for the use of the Utah and Northern and Oregon Short Line Railways.

The land so relinquished to be surveyed (if it shall be found necessary) by the United States and

laid off into lots and blocks as a townsite, and after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner, and upon such terms and conditions as Congress may direct.

The funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, to be deposited in the Treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the Secretary of the Interior to expend all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in such manner and at such times as he shall see fit.

Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as Congress may direct; and

Whereas in or about the year 1878 the Utah and Northern Railroad Company constructed a line of railroad running north and south through the Fort Hall Reservation, and has since operated the same, without payment, or any compensation whatever to the said Indians, for or in respect of the lands taken for right of way and station purposes; and

Whereas the treaty between the United States and the Shoshone and Bannack Indians, concluded July 3, 1868 (15 Stat. at Large, page

673), under which the Fort Hall Reservation was established, contains no provisions for the building of railroads through said reservation: Now, therefore,

ART. II. The Shoshone and Bannack Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of ($8.00) eight dollars for or in respect of each and every acre of land of the said reservation, taken and used for the purposes of its said railroad, the said Utah and Northern Railroad Company shall have and be entitled to a right of way not exceeding two hundred (200) feet in width, through said reservation extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof, together with necessary grounds for station and water purposes according to maps and plats of definite location, to be hereafter filed by said company with the Secretary of the Interior, and to be approved by him, the said Indians, parties hereto, for themselves and for the members of their respective tribes, hereby promising and agreeing to, at all times hereafter during their occupancy of said reservation, protect the said Utah and Northern Railroad Company, its successors or assigns, in the quiet enjoyment of said right of way and appurtenances and in the peaceful operation of its road through the reservation.

ART. III. All unexecuted provisions of existing treaties between the United States and the said Indians not affected by this agreement to remain in full force; and this agreement to take effect only upon ratification hereof by Congress.

Signed at the Fort Hall Agency, in the Territory of Idaho, by the said Robert S. Gardner and Peter Gallagher on behalf of the United States, and by the undersigned chiefs, headmen, and heads of families and individual members of the Shoshone and Bannack tribes of Indians, constituting a clear majority of all the adult male Indians of said tribes occupying or interested in the lands of the Fort Hall Reservation, in conformity with article eleven of the treaty of July 3, 1868, this twenty-seventh (27) day of May, A. D. one thousand eight hundred and eighty-seven (1887)."

[Here follow the signatures.]

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed and laid out into lots and blocks so much of the Fort Hall Reservation in the Territory of Idaho, at or near Pocatello Station, on the Utah and Northern Railway, as when the sectional and subdivisional lines are run and established shall be found to be within the following descriptions, to wit: The west half of section twenty-five, all of section twenty-six, the east half of section twenty-seven, the northwest quarter of section thirty-six, the north half of section thirty-five, the northeast

quarter of the southwest quarter of section thirty-five, and the northeast quarter of the northeast quarter of section thirty-four, all in township six south, of range thirty-four east, of Boise meridian, in the Territory of Idaho, and containing an area of one thousand eight hundred and forty acres, or thereabouts; saving and excepting thereout so much of the above described tracts as has heretofore been, or is hereby, granted for the use of the Utah and Northern Railway Company.

SEC. 3. That such survey shall describe the exterior boundaries of the said town according to the lines of the public surveys, also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement shall be verified under oath by the party making the survey; and within one month after making such verification there shall be transmitted to the General Land Office a verified transcript of such map and statement; a similar map and statement shall be filed with the register and receiver, and a similar copy shall be filed in the office of the recorder of the county wherein such town is situate.

SEC. 4. That at the time of the said survey, the Secretary of the Interior shall cause the said lots and blocks to be appraised by three disinterested persons, one of whom shall be designated by said Indians in open council and the other two by the Secretary of the Interior, who, after taking and subscribing an oath before some competent officer to faithfully and impartially perform their duties as appraisers of said lots and blocks under the provisions of this act, which oaths shall be returned with their appraisement, shall go in person upon the ground and determine the value of each lot and parcel thereof; making lists thereof, particularly describing each lot, block, and parcel, with the appraised value thereof, as by them determined, which said list shall be verified by the affidavit of at least two of said appraisers, to the effect that said list is a correct list of the said lots, blocks, and parcels appraised by them, and that the appraisements thereof are the true value of each parcel appraised, and that the same were determined by them after due and full inspection of each and every parcel thereof: *Provided*, That no lot or parcel shall be appraised at less than ten dollars, and that all improvements shall be appraised separate and distinct from the land.

SEC. 5. That upon the return of said survey, and the appraisement of said lands, if the same shall be approved by him, the Secretary of the Interior shall cause said lands to be offered for sale at public auction, at the door of the "Pocatello

House," Pocatello Junction, to the highest bidder, for cash, which sale shall be advertised for at least three months previous thereto, in such manner as the said Secretary shall direct, and shall be conducted by the register of the land office in the district in which said lands are situate, in accordance with the instructions of the Commissioner of the General Land Office. Said sale shall continue from day to day until all of the said lands shall have been sold or offered for sale. The said lands shall be offered in single lots and parcels, and no bid shall be received for any lot or parcel less than the appraised value of the same. All blocks, lots, and parcels of said lands not sold at public sale shall thereafter be subject to private entry of the appraised value thereof: *Provided*, That any person who has been residing upon any of said land, and has made valuable improvements thereon, shall, upon proof to that effect to the satisfaction of the Secretary of the Interior, be permitted to purchase at such sale, for cash, at the appraised value thereof, the lot or parcel so resided upon and improved by him, and in default of his exercising the preference right so conferred upon him by this section, such lot or parcel shall be sold to the highest bidder, for cash, as hereinbefore provided: *Provided further*, That such last-mentioned purchaser shall pay the owner of such improvements the appraised value thereof, as determined under the provisions of this act: *And provided further*, That any right heretofore

acquired by the Utah and Northern Railway Company for right of way and the use and occupancy of lands for station and depot purposes, through and upon the lands above described, shall not be affected by this act.

Sec. 6. That the funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, shall be deposited in the Treasury of the United States to the credit of the Shoshone and Bannack tribes of Indians belonging on said reservation, and shall bear interest at the rate of five per centum per annum; and the Secretary of the Interior is hereby authorized and empowered to expend all or any part of the principal and accrued interest of such fund for the benefit and support of said Indians, in such manner, and at such times as he may deem expedient and proper.

Sec. 7. That the Secretary of the Interior shall make all needful rules and regulations necessary to carry this act into effect; he shall determine the compensation of the surveyor for his services in laying out said lands into town lots, also the compensation of the appraisers provided for in section four, and shall cause patents in fee-simple to be issued to the purchasers of the lands sold under the provisions of this act in the same manner as patents are issued for the public lands.

Sec. 8. That the sum of five thousand dollars is hereby appropriated, out of any money in the

Treasury not otherwise appropriated, for the purpose of carrying this act into effect, which said sum, or so much thereof as may be expended, shall be reimbursed to the Treasury out of the sales of said lands.

Sec. 9. That the exterior lines of the land by this act authorized to be laid out into town lots and separating the same from the lands of said reservation shall, from the date of approval of said survey by the Secretary of the Interior, be, and constitute, the line of said reservation between the same and said town.

Sec. 10. That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

Sec. 11. That there be, and is hereby, granted to the said Utah and Northern Railway Company a right of way not exceeding two hundred feet in width (except such portion of the road where the Utah and Northern and the Oregon Short Line Railways run over the same or adjoining tracts, and

then only one hundred feet in width) through the lands above described, and through the remaining lands of the Fort Hall Reservation, extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof; and in addition to such right of way, grounds adjacent thereto for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, according to maps and plats of definite location thereof respectively, to be filed by said company with, and approved by, the Secretary of the Interior, except that at and near its station at Pocatello, in Idaho Territory, said railway company is granted for its use for station grounds, depot buildings, shops, tracks, side-tracks, turn-outs, yards, and for water purposes, not to exceed one hundred and fifty acres, as shown by maps and plats of the definite location thereof; and said company shall pay for said one hundred and fifty acres, in addition to the eight dollars per acre provided in said agreement, a further sum equal to the average appraisal of each acre of town lots in the proposed townsite of Pocatello, outside of said one hundred and fifty acres, provided for in section four of this act, said eight dollars per acre to be paid within one year from the passage of this act, and said additional sum immediately upon the completion of the appraisement aforesaid: *Provided*, That all lands acquired by said railway

company near its station at Pocatello for its use for station grounds, depot buildings, shops, tracks, side-tracks, turn-outs, yards, and for water purposes, as hereinbefore provided, shall, whenever used by said railway company, or its assigns, for other purposes, be forfeited and revert to the United States, and be subject to the other provisions of this act: *Provided further*, That the said Utah and Northern Railway Company shall first pay to the Secretary of the Interior, for the use and benefit of the said Shoshone and Bannack tribes of Indians, the sum of eight dollars per acre for, or in respect of each and every acre of land so taken and used for said right of way and station grounds, in conformity with said maps of definite location, the moneys derived from this source to be deposited in the Treasury of the United States, to the credit of the said Shoshone and Bannack Indians, bearing interest at five per centum per annum, with like power in the Secretary of the Interior, from time to time, to apply all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in the same manner as is hereinbefore provided with regard to the funds arising from the sale of lands of the Fort Hall Reservation: *And provided further*, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used, except in such manner and for such purposes only as shall be necessary for the construction, maintenance, and convenient

operation of a railway, telegraph or telephone lines, and when any portion thereof shall cease to be so used, such portion shall revert to the tribe or tribes of Indians from which the same shall have been taken, or in case they shall have ceased to occupy said reservation, to the United States; and the construction, maintenance, and operation of said railway shall be conducted with a due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

Sec. 12. That the officers, servants, and employees of said company necessary to the construction and management of said road, shall, while so engaged, be allowed to reside upon said right of way, and station grounds hereby granted, but subject, in so far as the reservation lands are concerned, to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with the said intercourse laws.

Sec. 13. That said railway company shall fence, and keep fenced, all such portions of its road as may run through any improved lands of the Indians, and also shall construct and maintain continually all road and highway crossings and necessary bridges over said railway, whenever said roads and highways do now or may hereafter cross said railway's right of way, or may be, by the proper authorities, laid out across the same.

Sec. 14. That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of killing or maiming of any Indian belonging to said tribes, or either of them, or of their live-stock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States: *Provided*, That all moneys so recovered by the United States attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

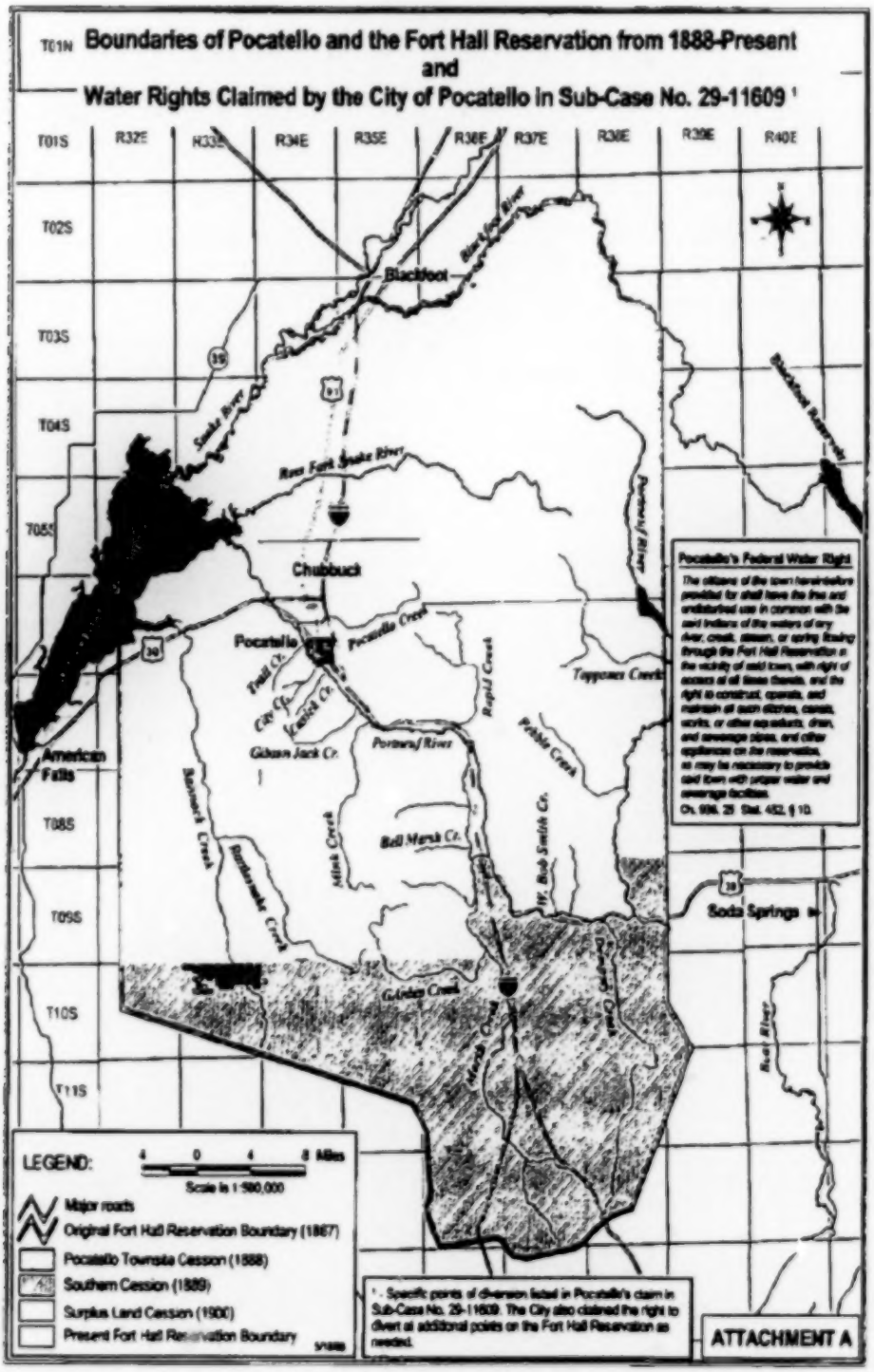
Sec. 15. That the said Utah and Northern Railway Company shall accept this right of way upon the expressed condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of

the Indians in their remaining lands, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

Sec. 16. That Congress may, at any time, amend, add to, alter, or repeal this act.

Approved, September, 1, 1888.

Appendix H



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No. 08-135

In the Supreme Court of the United States

CITY OF POCATELLO, IDAHO, PETITIONER

v.

STATE OF IDAHO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 10 of the Pocatello Townsite Act, Act of Sept. 1, 1888, ch. 936, 25 Stat. 455, grants petitioner an express federal right to waters on the Fort Hall Indian Reservation, rather than a right of access thereto and an opportunity to establish a water right under Idaho law through the beneficial use of water.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Byers v. *Wa-wa-ne*, 169 P. 121 (Or. 1917) 16
Caldwell v. *United States*, 250 U.S. 14 (1919) 8, 12
California v. *United States*:
438 U.S. 645 (1978) 8
457 U.S. 273 (1982) 12
Cherokee Nation or Tribe of Indians v. *Oklahoma*, 402 F.2d 739 (10th Cir. 1968), rev'd *sub nom.* *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970) ... 13
Choctaw Nation v. *Oklahoma*, 397 U.S. 620 (1970) 13
Hagen v. *Utah*, 510 U.S. 399 (1994) 14
Howell v. *Mississippi*, 543 U.S. 440 (2005) 14
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 9, 14
Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977) 14
Snake River Basin Water Sys., In re, 764 P.2d 78 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989) 5, 6
United States v. *Idaho*, 508 U.S. 1 (1993) 5, 6
Washington v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979) 15

Cases—Continued: Page

Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 15, 16
Winters v. *United States*, 207 U.S. 564 (1908) 9, 12

Constitution, treaty, statutes and rule:

U.S. Const.:
Art. IV, § 3, Cl. 2 (Property Clause) 7
Art. V, Cl. 2 (Supremacy Clause) 14, 15
Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, July 3, 1868, 15 Stat. 673 2
Art. XI, 15 Stat. 676 2
Act of July 3, 1882, ch. 268, 22 Stat. 148 2
Act of Sept. 1, 1888, ch. 936, 25 Stat. 452 4
§ 1, 25 Stat. 452 11
§ 10, 25 Stat. 455 ..... *passim*
§ 11, 25 Stat. 455 ..... 7, 11, 13, 16
Act of Mar. 3, 1891, ch. 543, 26 Stat. 1011 5
McCarran Amendment, 43 U.S.C. 666 6
Idaho Code (2003):
§ 42-1420 6
§ 42-1424 6
Idaho R. Civ. P. 54(b) 7

Miscellaneous:

1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* (1904) 2

In the Supreme Court of the United States

No. 08-135

CITY OF POCATELLO, IDAHO, PETITIONER

v.

STATE OF IDAHO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 1a-30a) is reported at 180 P.3d 1048. The memorandum decision and order of the district court (Pet. App. 31a-92a) and the relevant order of the Special Master (Pet. App. 101a-135a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on February 19, 2008. A petition for rehearing was denied on April 3, 2008 (Pet. App. 136a-137a). On June 13, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 1, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

This case involves petitioner's claim that it enjoys a right under federal law to divert and use a substantial quantity of water from the Snake River system. Petitioner filed its federal-law claim as part of the basin-wide Snake River Basin Adjudication, a consolidated water-rights proceeding conducted by an Idaho state district court. The state district court rejected petitioner's federal claim and certified its order for appeal. The Supreme Court of Idaho affirmed. Pet. App. 1a-30a.

1. Petitioner occupies territory that was formerly part of the Fort Hall Indian Reservation, on which Bands of the Shoshone and Bannock Tribes (Tribes) reside. The Reservation was created by Executive Order of President Andrew Johnson in 1867. Pet. App. 2a; see 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 836-837 (1904). The Tribes and the United States subsequently signed the Second Treaty of Fort Bridger, which confirmed the creation of the Reservation and provided for federal services to its residents. Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, July 3, 1868, 15 Stat. 673. The treaty also provided that any cession of reservation land would require the consent of "at least a majority of all the adult male Indians occupying or interested in the same." *Id.* Art. XI, 15 Stat. 676.

In 1878, the Utah Northern Railway Company built a north-south railroad line across the Reservation without obtaining permission from the Tribes or from the United States. Pet. App. 2a. In 1881, the railroad negotiated with the Tribes for an east-west right-of-way, which Congress approved. Act of July 3, 1882, ch. 268, 22 Stat. 148. The two railroad lines intersected at a site

called Pocatello Junction, petitioner's present-day location. Pet. App. 2a.

Non-Indians established a settlement at the site, trespassing on reservation lands. Despite efforts by federal officials to have the trespassers removed, the settlement remained. In 1887, federal officials negotiated a Cession Agreement with the Tribes whereby the United States would convey the Pocatello Townsite to the residents of the town and a right-of-way to the railroad for its existing tracks. Neither the negotiations that led to the Cession Agreement nor the Agreement itself discussed water or a right of access across the Reservation for water. Pet. App. 2a-3a.

When the time came to submit legislation to Congress to ratify the Cession Agreement, however, some discussion arose concerning the town's access to water. Pet. App. 3a-4a. The Commissioner of Indian Affairs accordingly proposed adding to the implementing legislation a water-related provision, Section 10, which he explained as follows:

> Inasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its supply of water, I have deemed it advisable, as a matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the water of any river, creek, stream or spring flowing though the reservations lands in the vicinity of the town, with the right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as

> may be necessary to provide with proper water and sewerage facilities.

Id. at 4a-5a. When the Secretary of the Interior submitted the draft legislation to the President, he summarized Section 10 as "provid[ing] for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing though the reservation lands in the vicinity of the townsite." *Id.* at 41a.

Congress ratified the Cession Agreement by enacting the legislation known as the Pocatello Townsite Act. Act of Sept. 1, 1888, ch. 936, 25 Stat. 452 (Townsite Act). Section 10 of the Townsite Act provides:

> That the citizens of [Pocatello] shall have the free and undisturbed use in common with the [Shoshone and Bannock] Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

25 Stat. 455.

Soon after the Townsite Act's enactment, a company building a canal to Pocatello asked the Commissioner of Indian Affairs whether Section 10 would give the company the right to go on the Reservation to construct the canal. The Department of Justice opined that Section 10 conferred no such right, because Section 10 "is in derogation of the rights of the Indians as secured by treaty" and therefore "should be strictly construed." Pet. App.

20a. In the Department's opinion, properly construed, "the statute authorizes those, at the time citizens of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that purpose to construct, operate, and maintain a canal. This right is in the nature of a *mere license*—authority to do an act, which without such authority would be illegal." *Id.* at 20a-21a (emphasis added).

Congress responded by enacting an appropriations rider authorizing the Secretary of the Interior "to grant rights of way into and across the Fort Hall Reservation in Idaho to canal, ditch, or reservoir companies for the purpose of enabling the citizens of Pocatello to thereby receive the water supply, contemplated by [Section 10]." Act of Mar. 3, 1891, ch. 543, 26 Stat. 1011. The rider also allowed the Secretary to "attach conditions as to the supply of surplus water to Indians on said Fort Hall Reservation." *Ibid.*

Since that time, petitioner has used waters diverted primarily from two local streams. Pet. 5. For more than a century, petitioner pursued its rights to that water exclusively under state law. Pet. App. 22a; see also *id.* at 44a-45a (following the enactment of the 1891 rider, members of the Pocatello Water Company began staking claims to water from nearby creeks in accordance with state water law).

2. In 1985, the Idaho Legislature enacted legislation to begin the Snake River Basin Adjudication (SRBA), a comprehensive proceeding to determine the rights to surface and groundwater in the Snake River Basin, which encompasses most of the State. See *United States* v. *Idaho*, 508 U.S. 1, 3-4 (1993); *In re Snake River Basin Water Sys.*, 764 P.2d 78, 81 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989). Shortly thereafter,

the State commenced the SRBA in state district court. *Ibid.* Pursuant to the McCarran Amendment, 43 U.S.C. 666, which waives federal sovereign immunity and allows a State to join the United States as a defendant in a suit for the adjudication of rights to the use of water of a river system or other source, the State joined the United States as a defendant in the SRBA. See *United States* v. *Idaho*, 508 U.S. at 4. Under Idaho law, the United States was thereby obligated, like other water users, to assert any water-right claims to which it believed it was entitled, and could file objections to water-right claims of others with which it disagreed. See Idaho Code §§ 42-1420, 42-1424 (2003).

3. In 1990, petitioner filed the claim at issue here as part of the SRBA. Pet. App. 6a. Petitioner had already filed 38 other claims based on state law and including the same water rights. *Id.* at 32a, 46a, 101a. The 1990 claim asserted, as an alternative legal theory to those state-law claims, that Section 10 gave petitioner a *federal* right to water from the Fort Hall Reservation, in the quantity "determined by the court to be reasonably necessary to meet the future municipal/irrigation needs of the city." *Id.* at 33a; see *id.* at 6a, 46a. The United States, the State of Idaho, and the Tribes filed objections to petitioner's claim, taking the position that the Townsite Act did not create a federal water right. See *id.* at 102a, 114a.[1]

The SRBA Special Master granted summary judgment for the United States, Idaho, and the Tribes, denying petitioner's claim to a federal water right. Pet. App.

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[1] Petitioner's notice of claim had asserted a federal *reserved* water right, see Pet. App. 33a, but petitioner subsequently abandoned that theory and asserted that the Townsite Act had given it an *express* federal water right. *Id.* at 8a, 46a.

101a-135a. The Special Master concluded that the Townsite Act did not grant petitioner a federal water right.

4. The state district court affirmed the Special Master. Pet. App. 31a-92a. The court agreed that the Townsite Act established a right of access for appropriating water, not a water right. The district court accordingly disallowed the federal-law basis for petitioner's water-right claims. *Id.* at 91a. The court certified its order as final and appealable on that federal-law issue, pursuant to Idaho Rule of Civil Procedure 54(b). *Id.* at 92a.

5. The Supreme Court of Idaho unanimously affirmed. Pet. App. 1a-30a.

The court acknowledged as a threshold matter that "[n]o one disputes Congress' power to make a grant of water rights," pursuant to the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2. Pet. App. 10a. But, the court noted, "[m]erely because Congress *could* have granted [petitioner] a federal water right does not mean it did so in this case." *Ibid.*; see *id.* at 29a.

The court concluded that the statutory text showed that Congress did not grant petitioner such a right. Section 10 "does not purport to grant a property interest," does not "make reference to a 'water right,'" and does not "contain[] [any] language defining the nature and scope of any water right supposedly granted." Pet. App. 11a. By contrast, in the very next section of the Townsite Act, Congress used unambiguous words of conveyance in specifying that it "hereby granted * * * a right of way" to the railroad. *Ibid.* (quoting Townsite Act, § 11, 25 Stat. 455). "Congress could easily have used [such language] in Section 10 but did not." *Id.* at 12a. Thus, the court stated, "[a] plain reading of the statu-

tory language shows that [petitioner] was not granted a federal water right." *Id.* at 13a.

Next, the court bolstered its conclusion by noting "the rule of strict construction that federal courts apply to statutes in which the government grants privileges or relinquishes rights." Pet. App. 11a. Under that clear-statement rule, such federal grant statutes are read to transfer no more than "what is conveyed in clear and explicit language." *Ibid.* (quoting *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919)); see *id.* at 7a-8a.

The court also confirmed that "[e]ven if the language were determined to be ambiguous, [petitioner's] claim would fail." Pet. App. 13a. Petitioner's interpretation of the Townsite Act, the court observed, would run contrary to the history of federal policy in dealing with water in the West, "through [which] runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 16a (quoting *California* v. *United States*, 438 U.S. 645, 653 (1978)). The court concluded that because Congress has incorporated that policy of deference into "a century's-worth" of federal statutes both before and after the Townsite Act, *id.* at 15a-17a, it would have used "explicit language" if it had intended Section 10 to be interpreted as a grant of federal water rights to petitioner's non-Indian citizens, *id.* at 17a.

Furthermore, the court determined that petitioner's claim conflicted with "the background for inclusion of Section 10 in the 1888 [Townsite] Act." Pet. App. 17a-22a. The discussions over the Cession Agreement "did not relate to water rights and who should have them but, rather, water sources and how to ensure that the City had access to them" without unlawfully trespassing on Indian land. *Id.* at 19a. And the Justice Department

opinion and subsequent appropriations rider, see pp. 4-5, *supra*, similarly involved access to water supplies, not water rights. Pet. App. 22a. "Thus," the court concluded, "neither the history or purpose of the [Townsite] Act supports [petitioner's] claim to a federal water right." *Ibid.* The court similarly found no subsequent history to support petitioner's claim of a federal water right as opposed to an opportunity to acquire water rights under Idaho state law. *Id.* at 20a-22a.

Finally, the court rejected petitioner's contention that the phrase "in common with" in Section 10 has an established interpretation that confers water rights, not just access rights. The cases to which petitioner pointed as announcing that interpretation, the court noted, all construed the phrase *in Indian treaties* and *for the benefit of Indian Tribes*, consistent with the canon of construction that ambiguities in Indian treaties are resolved in the Indians' favor. Petitioner, by contrast, seeks to interpret a federal statute for its own benefit, not the Tribes'. See Pet. App. 22a-25a. "Thus," the court held, "if Section 10 was ambiguous, [the] Court would construe it in favor of the Tribes, not [petitioner]." *Id.* at 26a.

As "[a]n additional consideration" on this point, Pet. App. 26a, the court noted two reasons not to adopt petitioner's reading, which would give petitioner a portion of the water right impliedly reserved to the Tribes by the Second Treaty of Fort Bridger, *id.* at 27a. See *Winters* v. *United States*, 207 U.S. 564 (1908). First, the abrogation of Indian treaty rights by statute generally requires a clear statement. Pet. App. 27a (citing *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). Congress did not expressly abrogate the Tribes' treaty rights, whereas it did so in another, near-contem-

poraneous townsite act adopted in 1885 and involving land in Pendleton, Oregon. See *id.* at 28a-29a; see also *id.* at 11a-12a. Second, the Tribes were never asked to give their consent to cede their water rights to petitioner, as the Second Treaty of Fort Bridger would seem to require and as was apparently done before the adoption of the 1885 Pendleton townsite act. See *id.* at 28a-29a. The absence of any "[s]erious discussions between the federal officials and the Indians" on the subject indicated to the court that Section 10 was not the sort of cession that would trigger the approval requirement. *Id.* at 28a.

ARGUMENT

The Supreme Court of Idaho correctly concluded that Section 10 is best understood to grant petitioner an opportunity to appropriate water under Idaho state law. That straightforward interpretation of a site-specific federal statute does not conflict with any decision of this Court or another appellate court, and it has no application elsewhere. Indeed, Section 10 appears never to have been construed in any previous reported case.

Furthermore, although petitioner raises various challenges to subsidiary aspects of the state supreme court's reasoning, it does not grapple with the court's central point: that "[a] plain reading of the statutory language shows that [petitioner] was not granted a federal water right," Pet. App. 13a. Rather, petitioner's contentions all pertain only to the court's *alternative* holding that petitioner would still lose "[e]ven if the language were determined to be ambiguous," *ibid.* The questions presented accordingly do not affect the outcome of this case, which is alone a sufficient reason not

to grant further review. In any event, petitioner's contentions lack merit.

1. Petitioner contends (Pet. 20-24) that the court below wrongly "reli[ed] on the absence of tribal consent" to cede any of the Tribe's reserved water rights to petitioner, and petitioner suggests that the court's reasoning broadly questions Congress's "constitutional power" to abrogate Indian treaty rights without obtaining the tribe's consent. Pet. 20. Petitioner misreads the court's opinion.

First, the court repeatedly made clear that it was not questioning Congress's power to legislate, despite petitioner's contentions to the contrary. Pet. App. 10a, 27a, 29a. Indeed, the court expressly stated that "Congress certainly has the power to abrogate Indian treaty rights." *Id.* at 27a. The court simply concluded that Congress did not choose to exercise that power in Section 10. *Id.* at 10a, 27a, 29a. Accordingly, petitioner's suggestion (Pet. 22-24) of a conflict with cases upholding the federal government's "plenary power over Indian affairs" is without merit.

Second, the court was considering the consent provision of the Second Treaty of Fort Bridger specifically. Petitioner's suggestion that the court announced a rule applicable to Indian law generally (Pet. 22, 25) is incorrect.

Third, the court concluded that the treaty's consent provision was relevant because *if* the Townsite Act had been intended to be read as petitioner wishes, there most likely would have been some attempt to use the treaty procedure to obtain the Indians' consent—as the government did with respect to other aspects of the Townsite Act, such as the cession of a right-of-way to the railroad. Townsite Act, §§ 1, 11, 25 Stat. 452, 455.

The absence of indication that the government made any such effort simply gave additional support to the view that Section 10 did not make the kind of cession that would require consent. Pet. App. 28a-29a. That discussion did not adopt the sort of sweeping "new rule" that petitioner suggests (Pet. 25). And it certainly does not create a conflict with cases permitting Congress to abrogate Indian treaty rights, because the court concluded that Congress intended no such abrogation here. The Second Treaty of Fort Bridger was merely an "additional consideration," Pet. App. 26a, in support of an alternative construction of an unambiguous statute.

2. Petitioner also contends (Pet. 26-31) that the court below erred in citing *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919), for the proposition that federal grants of property interests are "construed favorably to the government" and pass only "'what is conveyed in clear and explicit language.'" Pet. App. 7a-8a (quoting 250 U.S. at 20); see *id.* at 11a (similar). The two brief references to *Caldwell* were not a significant part of the court's analysis; they served only to confirm that, "[e]ven if the language [of Section 10] were determined to be ambiguous," petitioner could not prevail. *Id.* at 13a. To the extent the court below relied on *Caldwell*, it did not err.

The rule stated by *Caldwell* is well established. Accord, *e.g.*, *California* v. *United States*, 457 U.S. 273, 287 (1982) (noting "the principle that federal grants are to be construed strictly in favor of the United States"). And that rule properly applies where, as here, the contention is that the United States has made an affirmative grant of property rights—in this instance, water rights previously reserved by the federal government for the Indians' use. See *Winters* v. *United States*, 207

U.S. 564, 577 (1908); Pet. App. 27a. The court below therefore properly examined Section 10 for the clear statement required to find such a federal grant of a property interest. Petitioner derides the state supreme court's reasoning as creating a "'magic words' test." Pet. 27. But the court did not hold that any particular words were required; it merely reasoned that, "especially" in light of the principle stated in *Caldwell*, "Congress would have used more exacting language" in Section 10—such as the language it used in Section 11—"if it had intended to grant a water right to the City." Pet. App. 11a.

Petitioner also suggests (Pet. 26-31) that applying the *Caldwell* rule in the context of Indian treaty rights conflicts with decisions of this Court. Petitioner principally relies on *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), but that case is inapposite. The question in *Choctaw Nation* was whether the United States' treaties with the Cherokee, Choctaw, and Chickasaw Nations had conveyed to those Indian Tribes not just surface lands, but also the bed of the Arkansas River. *Id.* at 627-628. The Tenth Circuit relied on the *Caldwell* rule to resolve the ambiguity in the Indian treaties, and it accordingly held that title to the riverbed had remained with the United States (and subsequently passed to Oklahoma on its admission to the Union). See *Cherokee Nation or Tribe of Indians* v. *Oklahoma*, 402 F.2d 739, 747 & n.38 (1968). This Court reversed, holding that the ambiguity, like other ambiguities in an Indian treaty, should be resolved in the Indians' favor. See *Choctaw Nation*, 397 U.S. at 630-631, 634. Thus, to the extent that *Choctaw Nation* discusses the *Caldwell* rule, it simply holds that under the "exceptional circumstances" surrounding the Indian treaties at issue, *id.* at 639

(Douglas, J., concurring), the governing rule was the one construing ambiguities in the Indians' favor. *Id.* at 634 (opinion of the Court). That holding is of no benefit to petitioner, which is arguing for a broad interpretation of a grant that would take rights *away* from the Tribes.

Finally, petitioner suggests that in other cases, this Court has rejected the notion that a clear statement is required to abrogate Indian treaty rights. That assertion is incorrect. As this Court has recently explained, in a decision that postdates all of petitioner's authorities (see Pet. 28-29), "Congress may abrogate Indian treaty rights, *but it must clearly express its intent to do so.*" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (emphasis added). The cases petitioner cites merely stand for the proposition that the clear statement need not use any particular form of words and need not include a provision for definite payment of compensation to the Indians. *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 588 n.4 (1977). Thus, even if the applicability of a clear-statement rule were dispositive in this case, the court below did not contradict any precedent of this Court in applying the *Caldwell* rule in this context.

3. Petitioner also claims (Pet. 31-36) that the courts below violated the Supremacy Clause by holding that Section 10 granted petitioner only a right of access to the waters on the Reservation and an opportunity to perfect claims to those waters under state law. The state district court reached a similar conclusion, yet petitioner never raised its Supremacy Clause argument in the Supreme Court of Idaho. Accordingly, further review of this question would be contrary to this Court's longstanding practice. *E.g.*, *Howell* v. *Mississippi*, 543

U.S. 440, 443 (2005) (per curiam). In any event, petitioner's contention is incorrect.

The Supremacy Clause poses no bar to Congress's adopting state law as a rule of decision. Indeed, the Supremacy Clause does not independently restrain congressional authority. Therefore, petitioner's unsupported contention that the Constitution requires Congress to plainly manifest its intention to have state law, rather than federal law, apply to non-Indians' use of water resources is without merit.[2]

To be sure, state regulation *of Indians* on tribal land is the exception rather than the rule. See, *e.g.*, *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-474, 501 (1979). But state regulation of *non-Indians* and their access to *water* is perfectly consistent with federal policy. As the state supreme court noted, Congress historically has deferred to state law governing water use by non-Indians, rather than creating an independent system of federal water rights. Pet. App. 16a. And the state courts correctly observed that petitioner's reading of Section 10—which made no reference to a water right, the scope and nature of such a right, or how such a right would be administered—would be extremely atypical in light of this consistent federal policy.

Petitioner similarly misreads (Pet. 35-36) this Court's decision in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), in which the phrase "in common with" was

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[2] Petitioner suggests (Pet. 34 n.11) that resolution of this issue could affect certain other century-old statutes granting access to reservation lands, but offers no indication that any controversy (let alone an identical controversy) has ever arisen over the interpretation of those other statutes.

construed as the right of non-Indians to share in the quantity of a fishing resource. *Id.* at 674-678. There is no tension between the provision in Section 10 for non-Indians to "use" water "in common with" the Tribes and to "access" the water in question and the conclusion that claims of water rights acquired through such use are subject to Idaho's water laws. Section 10 refers to water "use" and "access" for that "use," which is consistent with the requirements for development of state-law water rights by actually applying the water to beneficial "use," not the conveyance of an express federal water right without regard to actual beneficial water use. By contrast, Section 11 of the Townsite Act expressly "granted * * * a right of way," showing that Congress did expressly grant property rights in this statute when that result was its intent. See also *Byers* v. *Wa-wa-ne*, 169 P. 121, 125 (Or. 1917) (discussing Congress's express "confirm[ation]" of a "water right" in the Pendleton townsite act).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2008

Supreme Court, U.S.
FILED
NOV 13 2008
OFFICE OF THE CLERK

No. 08-135

IN THE
Supreme Court of the United States

CITY OF POCATELLO,
Petitioner,

v.

STATE OF IDAHO, THE UNITED STATES OF AMERICA, AND THE SHOSHONE-BANNOCK TRIBES,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

REPLY OF CITY OF POCATELLO TO BRIEF OF THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page(s)

CASES

Caldwell v. United States, 250 U.S. 14 (1919).... 1, 3

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 8

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981)..... 4

Hagan v. Utah, 510 U.S. 399 (1994)..... 3

In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988) 7

Johnson v. United States, 163 F. 30 (1st Cir. 1908)..... 4

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 6

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) 6

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 US 172 (1999) 3

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)..... 4, 6

South Dakota v. Bourland, 508 U.S. 679 (1993)..... 6

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 3

State v. Wabashaw, 740 N.W.2d 583 (Neb. 2007) 6

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 6

Washington v. Wash. State Commercial Passenger Fishing Vessel, 433 U.S. 658 (1979) 5

Yellowbear v. State, 174 P.3d 1270 (Wyo. 2008) 6

STATUTORY PROVISIONS AND TREATIES

43 U.S.C. § 666 (2008) 7

Act of March 3, 1891, Chapter 543, 26 Stat. 989, 1011 7

Act of September 1, 1888, ch. 936, 25 Stat. 425 7

Treaty with Cheyenne and Arapahoe, Oct. 28, 1867, 15 Stat. 593 6

Treaty with Crows, May 7, 1868, 15 Stat. 635 6

Treaty with the Eastern Band of Shoshoni and Bannock Tribes, July 3, 1868, 15 Stat. 673 5

Treaty with Kiowas, Comanches and Apaches, Oct. 21, 1867, 15 Stat. 581, 589 6

Treaty with Navajo, June 1, 1868, 15 Stat. 667 6

Treaty with Northern Cheyenne and Arapahoe, May 10, 1868, 15 Stat. 655 6

Treaty with Sioux and Arapahoe, Apr. 29, 1868, 15 Stat. 635 6

Treaty with Utes, Mar. 2, 1868, 15 Stat. 619..... 6

Petitioner City of Pocatello ("Pocatello") respectfully submits this reply in response to the brief in opposition ("Opp.") filed by the United States (the "government").

INTRODUCTION

The government seeks to diminish the importance of this case by asserting that Pocatello misunderstands the Idaho Supreme Court's decision. According to the government, the Idaho court did not hold that Congress lacked the power to grant a water right to Pocatello, but only that Congress chose not to grant such a right in this case. *See* Opp. 10-11. The government supports that assertion by stating that Congress's choice is clear on the face of the statute (Opp. 10), but that statement is incorrect.

The plain language of the Act of September 1, 1888, ch. 936, 25 Stat. 425 ("1888 Act") does not support the government's position. The government's reading of the statute depends instead on the application of several inapplicable and improper tools of construction. In the government's view: (1) Congress may not constitutionally exercise its power unless it uses certain "magic words" of conveyance; (2) Congress may not diminish treaty rights unless it complies with the rule of *Caldwell v. United States*, 250 U.S. 14 (1919), a requirement this Court has never imposed in a diminishment case; (3) Congress may not apply federal law with respect to water rights on Indian reservations without expressly stating that federal, rather than state law,

applies; and (4) Congress may not affect tribal rights without the consent of the tribe where a limitation to that effect appears in a relevant treaty.

Thus, this is not a case in which the government divines congressional intent from the "plain language" of a statute, let alone one in which the "plain language" shows that Congress decided not to exercise its power. This is a case in which the court below first purported to condition the exercise of congressional power on Congress's satisfying certain tests that the court devised, and then determined that there was no need to decide what Congress actually intended because Congress had not satisfied the court's requirements. In essence, therefore, the Idaho court held that Congress lacked the power to legislate because Congress had failed to satisfy unprecedented requirements that the court imposed. That is a matter that clearly warrants review by this Court.

ARGUMENT

1. The government opposes the granting of certiorari on the ground that Pocatello allegedly has challenged only an "alternative holding" of the Idaho Supreme Court, and not the holding itself. (Opp. 10.) The government's assertion is incorrect. Pocatello has directly challenged the Idaho court's central holding, that is, that Section 10 cannot be construed as a congressional grant of a water right to Pocatello because Section 10 does not contain "historically recognized and accepted terms of conveyance such as 'grant' 'bargain' 'sell' or 'convey' evidencing a transfer in a property interest... [and] such statutes are

construed to pass nothing but what is conveyed in clear and explicit language. *Caldwell v. United States*, 250 U.S. at 20." Pet. App. 11a (internal quotation marks omitted). Thus, the Idaho Supreme Court determined that Congress lacks the power to convey a water right unless it uses the requisite "magic words." That clearly is a limitation on the power of Congress to legislate, and it is a limitation that never has been imposed by this Court in this area. *See* Pet. 27-30.

2. By finding Section 10 wanting under the *Caldwell* "express language" rule, the Idaho Supreme Court's holding (and the government's argument to this Court) confound two separate lines of authority. *See* Pet. 27-28. The government defends the decision below on the ground that the Idaho court did "not contradict any precedent of this Court in applying the *Caldwell* rule in this context." Opp. 14. But the *Caldwell* rule holds that express statutory language provides the only means for establishing clear congressional intent in those circumstances in which the rule applies. By contrast, this Court has consistently declined to hold that express statutory language is required to establish a clear congressional intent to diminish treaty rights. *Hagan v. Utah*, 510 U.S. 399, 411 (1994). Moreover, as Pocatello has shown (Pet. 28-29), the Court consistently has adhered to that position even in cases (*see, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)) contemporaneous with those that the government has cited and misconstrued. *See* Opp. 14, *quoting Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172,

202 (1999).[1] In diminishment cases, the courts "are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977), *quoting Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.).

3. The Idaho court imposed yet another improper limitation on the power of Congress – conditioning the application of federal law over waters on the Fort Hall Reservation on Congress's express assertion of federal jurisdiction. Pet. App. 17a. The government imposes this requirement and suggests that the analysis under Section 10 involves only the question whether state law controls "*non-Indians* and their access to *water*." Opp. 15 (emphasis in original). But the government mischaracterizes the question and misstates the law: federal law necessarily controls the distribution of natural resources on tribal lands, whether those resources are being developed by Indians or non-Indians (like Pocatello), unless Congress expressly provides otherwise. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52-53 (9th Cir. 1981) ("water use on a federal [Indian] reservation is not subject to state regulation absent explicit federal recognition of state

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[1] This confusion is further evidenced by the government's rephrasing of the question presented: "Whether Section 10... grants petitioner an *express* federal right to waters on the Fort Hall Indian Reservation..." (emphasis added). If the government truly believes that the right must be made "express," certiorari clearly should be granted to decide the question, since no such requirement has ever been imposed by the Court in this type of case.

authority"). In other words, the default rule is exactly contrary to that posited by the Idaho court. There is no need for Congress to assert directly that federal law applies to water rights on a reservation, and its "failure" to do so cannot work a forfeiture. The Idaho court's theory, now adopted by the government (*see* Opp. 15), turns the Supremacy Clause on its head. Moreover, knowing that its theory cannot pass muster, the government also erroneously suggests that Pocatello waived the point in the Idaho court. However, the point was clearly made and appropriately briefed by Pocatello below. (*See, e.g. City of Pocatello v. State of Idaho*, No. 33669, Idaho Supreme Court, City of Pocatello's Opening Brief 14-17, City of Pocatello's Reply Brief 8, 11-15, 30.)[2]

4. The government also seeks (Opp. 11) to denigrate the importance of this case by asserting, again without foundation, that the case involves only the meaning of language peculiar to a single instrument, the Treaty with the Eastern Band of Shoshoni and Bannock Tribes, July 3, 1868, 15 Stat. 673 ("1868 Second Treaty of Fort Bridger"), and that the tribal consent requirement that the court below imposed on Congress will have limited practical effect. But the language is not peculiar to this treaty. At least seven other Indian treaties have a

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[2] The government makes the same error when it purports to invoke state water law concepts to parse the federal statutory phrase "in common with" (*see* Opp. 15-16), rather than look to this Court's interpretation of the phrase in *Washington v. Wash. State Commercial Passenger Fishing Vessel*, 433 U.S. 658 (1979). *See* Pet. 35-36.

consent provision nearly identical to that involved here, and several of those consent provisions previously have been the subject of litigation.[3] Indeed, this Court has previously found diminishment in four of those cases, notwithstanding non-compliance with the relevant consent provisions. *See South Dakota v. Bourland*, 508 U.S. 679 (1993); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).[4] At least three other state and federal decisions address these treaties and analyze the diminishment issue without regard to the tribal consent requirement. *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005); *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008);[5] *State v. Wabashaw*, 740 N.W.2d 583 (Neb. 2007). The decision below puts in question the integrity of this jurisprudence, and, even more important, the power of Congress to act without tribal consent.

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[3] Treaty with Kiowas, Comanches and Apaches, Oct. 21, 1867, 15 Stat. 581, 589, Art. 12; Treaty with Cheyenne and Arapahoe, Oct. 28, 1867, 15 Stat. 593, Art. 12; Treaty with Utes, Mar. 2, 1868, 15 Stat. 619, Art. 16; Treaty with Sioux and Arapahoe, Apr. 29, 1868, 15 Stat. 635, Art. 12; Treaty with Crows, May 7, 1868, 15 Stat. 635, Art. 11; Treaty with Northern Cheyenne and Arapahoe, May 10, 1868, 15 Stat. 655, Art. 8; Treaty with Navajo, June 1, 1868, 15 Stat. 667, Art. 10.

[4] In that respect, as Pocatello has shown (*see* Pet. 22-24), the decision below directly conflicts with this Court's established jurisprudence.

[5] *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008), addresses diminishment of the 1868 Second Treaty of Fort Bridger, the same treaty at issue in this case.

5. Finally, the government makes much of the fact (Opp. 5) that Pocatello decided to file a federal law claim for its Section 10 water right in the SRBA, implying that Pocatello somehow sat on its rights. But Pocatello had no appropriate forum for adjudicating its rights until the SRBA was established. In fact, Pocatello has relied upon the water right granted in the 1888 Act since 1890, when Pocatello began using water from certain creeks on the Reservation and claimed the right to do so under the 1888 Act. Exs. 60, 62, 64, 65 to Ex. 24 of the Clerk's Certificate of Exhibits.[6] Of course, judicial confirmation is the very core of a water right. But it was not until the initiation of the SRBA, as Idaho's first McCarran Amendment adjudication, that Pocatello had its first opportunity to join all necessary parties, including the United States and the Tribes (all of whom previously were immune from suit) to adjudicate its Section 10 rights. *See* 43 U.S.C. § 666 (2008) ("McCarran Amendment"); *In*

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[6] The government mentions (Opp. 4-5) an 1891 letter written by assistant attorney-general George Shields, which purportedly supports the government's view that Pocatello's Section 10 water right must be obtained under state law. However, Shields's letter was limited to opining that corporate intermediaries could not develop reservation water supplies on behalf of the city. Congress immediately overturned Shields's interpretation by adopting the Act of March 3, 1891, ch. 543, 26 Stat. 989, 1011 ("1891 Act") which broadened the right of access to private corporations "for the purpose of enabling the citizens of Pocatello to receive the water supply, contemplated by section 10 [of the 1888 Act]." *See* Pet. 13. The government suggests no legal basis for this Court to defer to such a post-enactment legal interpretation, particularly where, as here, Congress immediately and expressly repudiated it.

re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 87-88 (Wyo. 1988); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-11 (1976). From the inception of the SRBA in 1987, however, Pocatello has claimed a water right under Section 10 of the 1888 Act. *See* Ex. 4 to the Clerk's Certificate of Exhibits.

CONCLUSION

Contrary to the government's assertions, the petition for a writ of certiorari raises serious and substantial questions of federal law. The decision below is contrary to the Constitution of the United States and to this Court's jurisprudence. Moreover, as a practical matter, that decision promises to have a substantial and pernicious effect on water rights throughout the west and on many other areas of the law affected by the diminishment doctrine.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 13, 2008